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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MOBIL OIL CORPORATION,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and VALDUS ADAMKUS, REGIONAL ADMINISTRATOR, REGION V, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Is the Validity of a Warrant Obtained by EPA Pursuant to its Alleged Authority Under the Clean Water Act to be Determined by the Standards for Demonstrating Probable Cause Set Forth in *Camara v. Municipal Court*, 387 U.S. 523 (1967), and *Marshall v. Barlow's*, 436 U.S. 307 (1978), or by the "Interest-Balancing" Test Adopted by the Court of Appeals in this Case?

2. Does an Affidavit Which Refers to an Alleged Inspection and Sampling Program but Does Not Recite or Incorporate by Reference the Criteria Governing that Program or Explain the Application of Those Criteria to the Facility Being Sampled Satisfy the Probable Cause Standards of *Camara* and *Barlow's*?

3. Does Section 308 of the Clean Water Act Authorize EPA to Sample Internal Wastewater Streams of a Facility When Such Sampling Is Not Required by the Facility's NPDES Permit or Agency Regulation, Is Not Necessary to Determine Compliance With the Act or the Facility's Permit, and Is Not Based on an Articulated Administrative Plan for Gathering Data to Support Development of New Effluent Limitations?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Mobil Oil Corporation* respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 14, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals in *Mobil Oil Corporation v. United States Environmental Protection Agency* is reported at 716 F.2d 1187 (7th Cir. 1983), and is reproduced in the Appendix to this petition. App. 1a. The final order and judgment of the district court is reported at 18 Env't Rep. Cas. (BNA) 2031 (N.D. Ill. 1982), and is also reproduced in the Appendix to this petition. App. 9a.

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* A list of Mobil Oil Corporation's parent, subsidiaries and affiliates, as required by Rule 28.1 of the Rules of the Supreme Court, follows the signature page of this petition. App. 1b.

JURISDICTION

The opinion of the Court of Appeals in this case was entered on September 14, 1983. A petition for rehearing and suggestion for rehearing *en banc* were denied on November 8, 1983. This petition is being filed within the time specified in Rule 20.2 of the Rules of the Supreme Court and 28 U.S.C. § 2101(c) (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., amend. IV.

Section 308 of the Clean Water Act, 33 U.S.C. § 1318 (1976 & Supp. V 1981), provides in pertinent part:

> (a) Whenever required to carry out the objective of this chapter, including but not limited to (1) developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard or standard of performance under this chapter; (2) determining whether any person is in violation of such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance; (3) any requirement established under this section; or (4) carrying out sections 1315, 1321, 1342, 1344 (relating to State permit programs), and 1364 of this title—

(A) The Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require; and

(B) The Administrator or his authorized representative, upon presentation of his credentials—

(i) shall have a right of entry to, upon, or through any premises in which an effluent source is located or in which any records required to be maintained under clause (A) of this subsection are located, and

(ii) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under clause (A), and sample any effluents which the owner or operator of such source is required to sample under such clause.

33 U.S.C. § 1318(a) (1976 & Supp. V 1981).

STATEMENT OF THE CASE

Petitioner Mobil Oil Corporation (Mobil) operates a petroleum refinery near Joliet in Channahon Township, Will County, Illinois. The Joliet refinery is among the most modern facilities of its kind in the United States.

The refinery discharges treated wastewater into the Des Plaines River pursuant to a National Pollutant Dis-

charge Elimination System (NPDES) permit issued by the State of Illinois.[1] In addition to the compliance monitoring which Mobil is required to perform and report to both EPA and the State of Illinois under the terms of its NPDES permit, the State of Illinois has inspected the Joliet refinery on an annual basis for compliance with the Clean Water Act (CWA).[2] The refinery has never been found to be in violation of any environmental law or regulation. In fact, in 1982, the Joliet refinery's wastewater treatment plant won an award from the State of Illinois for environmental excellence.

On April 28, 1982, three representatives from EPA's Region V office arrived at the Joliet refinery and requested permission to take samples of the refinery's discharges at the sampling points specified in Mobil's NPDES permit.[3] Those points, which enable sampling of Mobil's wastewater after final treatment, are located near the Des Plaines River and are separate from other

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[1] Under the Federal Water Pollution Control Act, as amended, commonly known as the Clean Water Act (CWA or the Act), 33 U.S.C. § 1251 *et seq.* (1976 & Supp. 1981), individual "point sources," defined as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged," 33 U.S.C. § 1362(14) (Supp. V 1981), must obtain a NPDES permit from the Administrator of the Environmental Protection Agency (EPA or the Agency) or from states, such as Illinois, that have approved permit programs. 33 U.S.C. § 1342(a), (b) (1976 & Supp. V 1981). The NPDES permit in effect at the time the inspection in this case took place was issued by the State of Illinois on December 11, 1980. That permit is set forth in the Appendix to this petition. App. 15a. The Joliet refinery is currently operating under an NPDES permit issued by the State of Illinois which became effective on February 9, 1983.

[2] *See, e.g.*, App. 41a.

[3] Mobil did not object to EPA's sampling of the Joliet refinery's discharges at the sampling points specified in Mobil's NPDES permit. Mobil agrees that EPA has authority to sample at those points. Thus, this case does not involve any attempt to prevent EPA from determining whether Mobil was in compliance with the terms of its NPDES permit. *See* text pp. 24, 25, *infra*.

parts of the refinery's operations.[4] After the EPA representatives obtained samples from these points, they asked to sample wastewater streams and sludges before final treatment at points which were located inside the wastewater treatment area of the Joliet refinery.[5] Those points were not designated for sampling in Mobil's NPDES permit. EPA's representatives did not explain why the Joliet refinery had been chosen for internal wastewater sampling, nor did they indicate the use to which the data obtained from that sampling would be put. Mobil denied the EPA representatives' request to take samples of its internal wastewater streams and sludges because neither section 308 of the CWA nor its NPDES permit required those streams to be sampled.

Four months later, on August 24, 1982, EPA made an *ex parte* application to a federal magistrate for a warrant "to enter, inspect and photograph" Mobil's refinery and "to take samples of sludge and liquid influents and effluents of the Mobil Oil Company facility . . . in accordance with Section 308 of the Clean Water Act, 33 U.S.C. § 1318."[6] That provision states, in pertinent part, that the Administrator or his authorized representative

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[4] Mobil's NPDES permit required it to sample process wastewater, sanitary wastewater, non-contact cooling water and storm water "at a point representative of discharge but prior to mixing with other effluents." App. 18a, 20a, 22a, 24a. Since a "discharge" occurs under the CWA only upon "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12)(A) (1976), the place at which samples "representative of discharge" are taken is located near the Des Plaines River in order to allow monitoring of each effluent stream after treatment but before mixing with other effluent streams.

[5] Specifically, the EPA inspectors requested permission to sample wastewater streams that had not yet entered the aeration basin or the treated water guard basin located inside the refinery, and sludge, which is removed from wastewater and is never discharged, that had not yet been subjected to heat treatment.

[6] App. 42a.

may "sample any effluents which the owner or operator of such [point] source is required to sample" under clause (A) of section 308(a). 33 U.S.C. § 1318(a)(B)(ii) (1976).[7] Neither Mobil's permit, nor EPA's regulations, required Mobil to perform internal wastewater sampling.

EPA's one-page application for a warrant was accompanied by affidavits executed by Basim J. Dihu, the EPA Region V environmental engineer who had been refused permission to conduct internal wastewater sampling at the Joliet facility, and Jonathan Barney, another local EPA employee.[8] The Dihu affidavit simply recited the events leading up to Mobil's refusal to permit EPA's representatives to sample internal wastewater streams and sludges at the Joliet facility.[9] The Barney affidavit stated that such sampling was "part of an ongoing administrative program to monitor facilities that have some potential for the discharge of toxic pollutants" and was intended "to monitor compliance with existing NPDES permit requirements."[10] Mr. Barney's reference to this monitoring program, however, consisted only of his characterization of it as "extended compliance sampling inspections for toxicants (known as CSI-Ts)" which were designed "to check for compliance with existing effluent limitations and other permit requirements, and to determine whether additional toxic pollutants are being discharged that should be limited and otherwise addressed in the next permit."[11] His affidavit did not describe or

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[7] Clause (A) of section 308(a) authorizes the Administrator to require the owner or operator of a point source to "sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe) . . . ." 33 U.S.C. § 1318(a)(A)(iv) (1976).

[8] App. 43a.

[9] App. 46a.

[10] App. 45a.

[11] App. 43a-44a.

incorporate by reference the administrative plan on which this alleged program was based. Nor did it articulate reasons why Mobil's refinery had been chosen for inspection under that program.[12]

On August 27, 1982, the magistrate issued the warrant requested by EPA on the basis of his finding that "there has been a sufficient showing that reasonable legislative or administrative standards for conducting an inspection and investigation have been satisfied . . . ." [13]

On Monday, August 30, 1982, EPA served the warrant upon Mobil and began sampling internal wastewater streams at the Joliet refinery. On the next day, Mobil filed a motion to quash the warrant which argued, *inter alia*, that EPA had failed to meet the standards for probable cause established in *Camara v. Municipal Court*, 387 U.S. 523 (1967), and *Marshall v. Barlow's*, 436 U.S. 307 (1978). On the same day, August 31, 1982, Mobil's motion to quash the warrant was denied. EPA's sampling of internal wastewater streams at the Joliet refinery continued until September 2, 1982.

On September 2, 1982, Mobil filed in the District Court for the Northern District of Illinois an appeal from the magistrate's denial of its motion to quash the warrant, and a complaint which sought injunctive relief against

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[12] Moreover, the affidavit failed to explain why, after a wait of four months, the Agency felt compelled to seek an *ex parte* warrant rather than to follow the procedures specified in section 309 of the Clean Water Act which requires the issuance of an administrative order or a district court action for injunctive relief in the event of a failure to comply with section 308. 33 U.S.C. § 1319 (1976 & Supp. V 1981).

[13] App. 48a. The warrant authorized EPA to "sample and seize" internal wastewater streams consisting of "combined effluent from the east and west clarifiers of the activated sludge treatment system," "sludge prior to the heat treatment system," and "influent to the east and west aeration basin of the activiated [sic] sludge treatment system (combined raw waste following east equalization basin) . . . ." App. 49a.

further execution of the warrant and against EPA's use of data obtained from the internal wastewater sampling, and which also requested a declaratory judgment and a permanent injunction against further sampling at the Joliet refinery. Jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 1331 (Supp. V. 1981). After consolidating these actions, the district court, on September 7, 1982, issued an order requiring EPA to retain, and refrain from using for any purpose, the samples obtained pursuant to the warrant.

Before the district court, Mobil argued that EPA's sampling of internal wastewater streams exceeded the scope of the Agency's authority under section 308 of the Clean Water Act and violated Mobil's rights under the Fourth Amendment. Rejecting these arguments, the district court, on December 28, 1982, issued a final order and judgment holding that inspection and sampling of Mobil's internal wastewater streams were authorized by a valid warrant and by section 308 of the Act.[14] On the same day, the district court granted Mobil's motion for a stay pending appeal for a period of twenty days.

On January 10, 1983, Mobil appealed the district court's decision to the United States Court of Appeals for the Seventh Circuit, pursuant to 28 U.S.C. § 1291 (1976 & Supp. V 1981). On the next day, Mobil filed a motion for stay pending appeal with the Court of Appeals. That court, on January 17, 1983, issued an order prohibiting EPA from using or transmitting the samples obtained under the warrant, and from inspecting or sampling Mobil's wastewater streams in the future at points other than those specified in the NPDES permit for the Joliet refinery.

In its appeal to the Seventh Circuit, Mobil argued that neither section 308 of the CWA nor the NPDES permit issued for the Joliet refinery authorized EPA to sample

[14] App. 11a.

internal wastewater streams, and that such sampling was an unreasonable search and seizure of Mobil's property in violation of the Fourth Amendment.[15] The Court of Appeals, in an opinion issued on September 14, 1983, rejected Mobil's arguments.

Rather than testing the affidavits submitted by EPA against the standards for demonstrating probable cause set forth in *Barlow's*, the Seventh Circuit engaged in a balancing of what it viewed as the privacy interests of Mobil against the government's interest in sampling internal wastewater streams at Mobil's refinery.[16] It concluded that Mobil had no interest in preventing internal sampling of its facility other than "to keep the EPA in the dark as much as possible about what pollutants are present in the water it dumps into the Des Plaines River and about how efficient its treatment processes are at cleaning its waste water of pollutants." [17] The Court of Appeals also found that "[a]ny interest Mobil may have in frustrating the EPA's efforts to assess the efficiency of its treatment processes and to detect trace amounts of toxic pollutants in waste water it dumps into the Des Plaines River is not entitled to protection." [18]

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[15] As noted above, note 3 *supra*, Mobil did not challenge EPA's right to conduct discharge sampling at the points specified in Mobil's NPDES permit.

[16] 716 F.2d 1190-91, App. 4a. The Court of Appeals in its opinion never mentioned *Camara*, *Barlow's* or this Court's other decisions addressing the standards for obtaining *ex parte* search warrants by administrative agencies. Indeed, the Seventh Circuit never even mentioned its own decisions interpreting the probable cause test set forth in those cases. *See* note 23, *infra*.

[17] 716 F.2d at 1190, App. 5a. There was never any allegation by EPA, or anyone else, during the entire course of this case that Mobil wanted to "keep EPA in the dark" about its discharges into the Des Plaines River or about the efficiency of its treatment processes.

[18] *Id.*, App. 6a.

One day after issuance of the Seventh Circuit's decision, the Deputy Director of EPA's Water Division sent a memorandum to all of the Agency's regional offices interpreting that decision as conferring "very broad authority" upon the Agency to sample internal wastewater streams within an industrial facility.[19]

Mobil subsequently filed a petition for rehearing and suggestion for rehearing *en banc* urging the full Seventh Circuit to review the panel's opinion. This petition was denied on November 8, 1983.[20]

On November 15, 1983, Mobil petitioned the Court of Appeals to stay the issuance of its mandate pending Mobil's application to this Court for a writ of certiorari. Two days later, Chief Judge Cummings, author of the opinion in this case, denied Mobil's petition for stay of the mandate "[b]ecause our opinion was clearly right."

On November 23, 1983, Mobil filed with this Court an application to stay the mandate of the Seventh Circuit and to reinstitute the stay entered by that court on January 17, 1983 prohibiting EPA from using or transmitting the samples obtained under the warrant and from inspecting wastewater streams at points other than those specified in the NPDES permit. Justice Stevens, acting for this Court, denied Mobil's application on November 23, 1983.

REASONS FOR GRANTING CERTIORARI

Certiorari should be granted in this case because the opinion of the Seventh Circuit directly conflicts with this Court's decisions in *Marshall v. Barlow's*, 436 U.S. 307 (1978), and *Camara v. Municipal Court*, 387 U.S. 523 (1967), and with decisions of other circuit courts of appeals which require either evidence of a violation or an

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[19] App. 51a.

[20] App. 14a.

articulated administrative plan based on neutral criteria before finding probable cause for a search and seizure by an administrative agency. EPA clearly failed to satisfy these requirements in obtaining the warrant at issue in this case. However, instead of applying the standards set forth in *Barlow's* to the affidavits EPA submitted to justify its sampling of Mobil's internal wastewater streams, the Seventh Circuit substituted its own "interest-balancing" analysis in determining the legality of that sampling. As a result, the Seventh Circuit has effectively eliminated any requirement that EPA demonstrate probable cause before it obtains warrants to search and seize the property of those regulated under the Clean Water Act.

Certiorari should also be granted because this case presents important questions of law that deserve this Court's attention. Thousands of industrial facilities are subject to regulation under the Clean Water Act. The showing required of EPA before it can engage in nonconsensual inspections and sampling of those facilities is of great concern to those subject to that Act as well as to those who are subject to other federal environmental statutes. Particularly as agency activity under those laws moves into the enforcement stage, there is a compelling need for this Court to provide more detailed guidance to the lower courts in the application of the probable cause standards of *Barlow's*. In some instances, the lower courts have scrupulously required full agency compliance with the tests for probable cause established by this Court. Other courts, however, such as the Seventh Circuit in this case, have upheld the issuance of warrants to administrative agencies on the basis of nothing more than conclusory, self-serving affidavits that fail to articulate an administrative plan on which the desired search is based and fail to explain how the particular facility is covered by that plan. The lower courts should not be left free to create their own interpretations of the *Barlow's* standards. Only a definitive statement from this Court regarding

the showing that is necessary to meet those standards can ensure consistent and proper application of *Barlow's*.

Finally, certiorari should be granted in this case of first impression to correct the erroneous interpretations by the district court and the Court of Appeals of EPA's authority under section 308 of the CWA. The breadth of EPA's authority under this section of the CWA is clearly an important issue of federal law. Neither the Act nor its legislative history provides any basis for the sampling of internal wastewater streams carried out by EPA in this case. Yet with the Seventh Circuit's opinion in hand, EPA can now claim probable cause for non-consensual searches and seizures on the basis of its supposed plenary authority to inspect and seize samples from anywhere within a facility subject to the Act. That this is not a hypothetical problem is demonstrated by the rapidity with which EPA seized upon the Court of Appeal's decision as justification for a broad program of internal wastewater sampling.

A. The Decision of the Court of Appeals Conflicts With This Court's Decisions in *Camara* and *Barlow's*

This Court held in *Camara* and *Barlow's* that normally, where consent is not given for a search or seizure by an administrative agency, the Fourth Amendment requires the agency to obtain a warrant before proceeding. *Camara*, 387 U.S. at 528-29; *Barlow's*, 436 U.S. at 312-13. The Court also articulated the standards for demonstrating the probable cause necessary to obtain such a warrant. *Camara*, 387 U.S. at 538; *Barlow's*, 436 at 320-21.[21] Recognizing its obligations under *Barlow's*,

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[21] EPA has acknowledged that, with the possible exception of the Federal Insecticide, Fungicide, and Rodenticide Act, a warrant is required for inspections under each of the environmental statutes administered by the Agency, including the Clean Water Act. *Environment Reporter (BNA)*, 41 *Federal Laws Index* 2451 (April 11, 1979). *See also* App. 54a.

EPA applied for and obtained an *ex parte* warrant to perform internal wastewater stream sampling at Mobil's Joliet refinery. Yet in reviewing Mobil's claim that EPA had not demonstrated probable cause to support issuance of that warrant, the Seventh Circuit did not examine EPA's action in light of the standards set forth in *Barlow's*.[22] Instead, EPA's failure to demonstrate probable cause for a warrant to sample Mobil's internal wastewater streams was blessed by the Seventh Circuit in an opinion which effectively eliminates that requirement.

In determining the legality of a search or seizure conducted by an administrative agency pursuant to a warrant, other circuit courts of appeals have uniformly tested the validity of a warrant by the probable cause standards established by this Court in *Barlow's*.[23] In this case, however, the Seventh Circuit used its own "interest-balancing" analysis to determine whether Mobil had any Fourth Amendment rights which the Court deemed worthy of protection and whether EPA's regulatory interest outweighed Mobil's privacy interest. According to the Court of Appeals, this "interest-balancing" analysis consisted of

> identify[ing] what interest Mobil has in preventing the EPA from sampling untreated waste water, what

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[22] The district court found that EPA's inspection and sampling were authorized by section 308 and consistent with the Fourth Amendment. 18 Env't Rep. Cases (BNA) at 3032, App. 11a. However, it did not discuss the basis for these findings.

[23] *See, e.g.*, Donovan v. Wollaston Alloys, Inc., 695 F.2d 1 (1st Cir. 1982); United States v. Mississippi Power & Light Co., 638 F.2d 899 (5th Cir.), *cert. denied*, 454 U.S. 892 (1981); Stoddard Lumber Co. Inc. v. Marshall, 627 F.2d 984 (9th Cir. 1980).

Indeed, in the OSHA context, the Seventh Circuit itself has recognized the applicability of the probable cause standards to searches by administrative agencies. *See* Marshall v. Chromalloy American Corp., 589 F.2d 1335 (7th Cir.), *cert. denied*, 444 U.S. 844 (1979); *In Re* Northwest Airlines, Inc., 587 F.2d 12 (7th Cir. 1978).

> interest the EPA has in getting those samples, and . . . inquir[ing] whether Congress somehow balanced those interests when it enacted Section 308, or if not, how Congress would likely have balanced them had it undertaken to do so.[24]

The Seventh Circuit's use of this novel analysis conflicts directly with the rule established by this Court in *Camara* and *Barlow's*. Those cases hold that, unless the government can prove the application of one of the carefully defined exceptions to the warrant requirement, searches of a commercial establishment without a valid warrant are *per se* unreasonable and that the owner's privacy interest suffers regardless of his motivation for forcing the government to obtain a warrant or the government's purpose for the search or seizure of property. *Barlow's*, 436 U.S. at 312-13. If it is not reversed, the Seventh Circuit's decision will establish a standard for testing the legality of searches and seizures of private property under the Clean Water Act which conflicts directly with the prior holdings of this Court and other circuit courts of appeals.[25]

Had the Seventh Circuit tested EPA's actions against the standards set forth in *Camara* and *Barlow's*, it would have found that there was no probable cause to support issuance of the warrant. For a warrant to be valid, an agency has the burden of demonstrating probable cause.

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[24] 716 F.2d at 1189, App. 4a.

[25] Moreover, as a means of resolving the intended limits of EPA's authority under section 308 of the CWA, the Court of Appeals' "interest-balancing" analysis does not comport with recognized tools of statutory construction. It does not start with the language of the statute, employ any of the canons of statutory construction, or consider the legislative history of the provision at issue. Rather, it hypothesizes the potential interests of each litigant and then seeks to balance those interests through an analysis Congress never contemplated, much less sanctioned.

Barlow's, 436 U.S. at 320. In the context of a search and seizure of property by an administrative agency, probable cause may be based on either "specific evidence of an existing violation" or on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." *Id.* at 320-21 (quoting *Camara*, 387 U.S. at 538). There is no allegation in the Barney or Dihu affidavits that Mobil was in violation of the terms of its NPDES permit.[26] Nor has EPA contended at any time in this litigation that any such facts exist. Instead, this was a routine inspection and sampling, for which probable cause can be established only if EPA's action was the result of a legislative or "administrative plan containing specific neutral criteria." *Barlow's*, 436 U.S. at 323.

To meet this latter test, EPA must, at a minimum, satisfy two requirements. First, it must be seeking the warrant pursuant to an administrative plan containing neutral criteria which specify "the purpose, frequency, scope, and manner" of conducting sampling. *Michigan v. Tyler*, 436 U.S. 499, 507 (1978); *Barlow's*, 436 U.S. at 323. Second, the Agency must show why the sampling of Mobil's facility fits the neutral criteria of the administrative plan or program. *Barlow's*, 436 U.S. at 320-21, 323 n.20. Neither requirement was satisfied in this case.

As the sole justification for obtaining a warrant, EPA claimed that samples from Mobil's treatment processes and internal wastewater streams were necessary to determine whether Mobil was in compliance with the terms of its permit and to determine whether "additional pollutants are being discharged which should be limited . . . in the next permits." The Agency claimed these actions were being taken pursuant to a "CSI-T" program for monitoring toxic pollutants. The Barney affidavit,

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[26] *See* App. 43a-47a.

however, failed to describe the specific toxic pollutants or particular point source categories covered by the "CSI-T" program or the method used to select facilities for inclusion in it.[27] Nor did the affidavit provide information about the purpose, frequency, scope, and manner of conducting sampling under the program. Finally, EPA failed to explain why the Joliet refinery was chosen for inspection under the CSI-T program when it was already subjected to annual compliance inspections by the State of Illinois and self-monitoring and reporting to the State and EPA under the terms of its NPDES permit.[28] Rather, EPA relied solely on the type of "bare assertion" about the existence of this administrative program held insufficient in *Barlow's*.[29]

In fact, it is clear that EPA's sampling of Mobil's internal wastewater streams was not consistent with or authorized by an administrative plan based on neutral criteria. In response to a Freedom of Information Act re-

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[27] *Barlow's*, 436 U.S. at 323 n.20. EPA's failure to provide any meaningful program description in support of its request for a warrant stands in marked contrast to the detailed descriptions of OSHA programs upheld by several courts of appeals. Donovan v. Wollaston Alloys, Inc., 695 F.2d 1 (1st Cir. 1982); Stoddard Lumber Co., Inc. v. Marshall, 627 F.2d 984 (9th Cir. 1980); Marshall v. Chromalloy American Corp., 589 F.2d 1335 (7th Cir.), *cert. denied*, 444 U.S. 884 (1979). In each of these cases, the affidavits showed that the Secretary of Labor had established an inspection program concentrating on a particular industry, the industry had been selected based on data about injury rates contained in the Secretary's files, and the criteria for selection of the industry were directly related to the Secretary's statutory responsibility for reducing workplace hazards. Moreover, at least one circuit required a detailed description of the procedure for systematically selecting the target industries of an inspection in order to demonstrate the regularity of the program. *Wollaston*, 695 F.2d at 3, 5.

[28] *See* App. 20a-21a.

[29] 436 U.S. 323 n.20. *See In Re* Northwest Airlines, Inc., 587 F.2d 12 (7th Cir. 1978). *See also*, Weyerhaeuser v. Marshall, 592 F.2d 373 (7th Cir. 1979).

quest, EPA has released documents which demonstrate that (1) compliance sampling inspections or " CSIs" are for the purpose of determining compliance with NPDES permit limitations and not for the gathering of data to determine whether additional effluent limitations should be imposed in an NPDES permit,[30] (2) during compliance sampling inspections, samples are to be taken at "the facility's discharge and other NPDES permit-designated monitoring points",[31] (3) when entry is being sought for the purpose of gathering data to develop new effluent limitations guidelines, EPA policy requires a lengthy affidavit detailing the specifics of the administrative program for which the data are being sought and why the particular facility has been chosen for that program,[32] and (4) that there is no administrative plan or program based on neutral criteria for sampling internal wastewater streams and processes at a facility to gather data for case-by-case additional NPDES permit limitations.

In short, EPA's affidavits in support of its application for a warrant in this case fall far short of meeting the *Barlow's* test for probable cause. By not only affirming the district court's ruling but also by establishing an erroneous new standard for reviewing EPA searches and seizures under the CWA, the Seventh Circuit has made the probable cause requirement of the Fourth Amendment

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[30] App. 86a-87a.

[31] App. 93a.

[32] App. 57a, 77a-85a. Even if EPA had submitted such an affidavit in support of its request for a warrant in this case, probable cause would not have been established for an inspection and sampling of internal wastewater streams and treatment facilities at the Joliet refinery. To be valid, an administrative plan must be consistent with the agency's statutory authority. *Barlow's*, 436 U.S. 323. As discussed below, *see* text pp. 21-27, *infra*, EPA has no authority under section 308 of the CWA to engage in nonconsensual sampling of Mobil's internal wastewater streams.

virtually meaningless when applied to EPA warrant applications. In the future, magistrates will be asked simply to rubber-stamp EPA assertions of broad statutory authority justifying seizures of private property. In order to prevent such a result, this Court should correct the Seventh Circuit's error.

B. This Case Presents Important Questions of Law That Deserve Attention By This Court

The constitutional and statutory issues presented by this case deserve this Court's prompt attention. The Clean Water Act is one of the most significant environmental statutes enacted during the past decade. Virtually all of American industry is subject to its requirements. Given the alacrity and expansiveness of EPA's response to the Seventh Circuit's decision, the Agency clearly intends to take full advantage of it. The memorandum issued by EPA the day after the Seventh Circuit's decision assumes the Agency has a *carte blanche* to engage in inspection and internal sampling of facilities subject to the CWA. If left undisturbed, the Seventh Circuit's decision not only will result in searches and seizures that are unauthorized by section 308, but also in warrants based on Agency assertions of virtually unbridled discretion under the Clean Water Act to inspect and seize private property of America's corporate citizens.

The march of intrusive agency sampling will not stop with the Clean Water Act. It is reasonable to expect that the authority claimed by EPA for in-plant sampling will be extended to the other major environmental statutes implemented by that Agency. There is, for example, a pronounced similarity between the sampling authority granted by section 308 of the Clean Water Act and that granted by section 114 of the Clean Air Act, 42 U.S.C. § 7414 (Supp. V 1981).[33] Where the statutory limitations

[33] EPA has shown no hesitancy to stretch its inspection authority under section 114 of the Clean Air Act to its full limits and

on sampling are less strict,[34] EPA will likely see no legal restraint at all upon its seizure of in-plant samples. Thus, the decision of the Seventh Circuit in this case points the way for a repetitive series of unconstitutional searches and seizures under many of the major environmental statutes.

Because of the pervasiveness of the federal environmental laws and the likelihood that EPA will engage in the future in numerous inspections and sampling of facilities that are subject to their provisions, this Court should provide clear guidance to the lower courts on the application of *Barlow's* probable cause requirement to such inspections and sampling. For the most part, the environmental statutes have now been implemented through promulgation of substantive standards, and the regulatory effort will naturally turn to the enforcement of these standards through inspections and sampling of regulated facilities. Without a clearer explanation of the *Barlow's* probable cause standard than this Court has provided to date, the lower courts may acquiesce in intrusive and unjustified enforcement of this federal legislation at the expense of the constitutional rights of those subject to its reach.

The likelihood of such an occurrence is underscored by the fact that the lower courts, in the OSHA context, have demonstrated substantial variance in their application of what has been termed the "extremely vague" standard set forth in *Barlow's*.[35] For example, the First and Ninth Circuits have scrutinized warrant applications and sup-

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beyond. Dow Chemical Co. v. EPA, 536 F. Supp. 1355 (E.D. Mich. 1982) (use of surreptitious aerial photography to probe internal processes of chemical plant found unauthorized under section 114).

[34] *See* Resource Conservation and Recovery Act, 42 U.S.C. § 6927(a)(1) (Supp. V 1981); Comprehensive Environmental Response, Compensation, and Liability of Act of 1980, 42 U.S.C. § 9604(e)(1)(B) (Supp. V 1981).

[35] *See* Rothstein. *OSHA Inspections After Marshall v. Barlow's, Inc.*, 1979 Duke L.J. 63, 90.

porting affidavits for detailed information on how target industries were selected for inspection under an administrative plan, while the Third and Sixth Circuits have not even looked to see whether there was an administrative plan or any specific neutral criteria but have instead based their finding of probable cause solely on the agency's assertion that the premises had never been searched before. *Compare Donovan v. Wollaston Alloys, Inc.*, 695 F.2d 1, 5 (1st Cir. 1982), and *Stoddard Lumber Co., Inc. v. Marshall*, 627 F.2d 984, 988 (9th Cir. 1980), *with United States v. Prendergast*, 585 F.2d 69, 70 (3d Cir. 1978), and *United States v. Voorhies*, 663 F.2d 30, 33 (6th Cir. 1981), *cert. denied*, 456 U.S. 929 (1982).[36] Moreover, while the First and Ninth Circuits have relied on conclusory assertions in assessing whether an agency has adequately shown that a particular company meets the criteria specified in a valid administrative plan, the Eleventh and Seventh Circuits have required the agency to demonstrate, based on specific facts about a particular facility, that it satisfies each of the neutral criteria of the administrative plan. *Compare Wollaston*, 695 F.2d at 6 and *Stoddard Lumber*, 627 F.2d at 988, *with First Alabama Bank of Montgomery v. Donovan*, 692 F.2d 714, 716-17, 721-22 (11th Cir. 1982), and *In Re Matter of Northwest Airlines*, 587 F.2d 12, 15 (7th Cir. 1978).

In sum, the conclusory nature of EPA's affidavits and the lower courts' rubber-stamping of EPA's warrant application demonstrate the need for this Court to articulate more clearly the probable cause requirement of *Barlow's* in order to prevent agencies in the future from obtaining

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[36] Despite their general agreement that an agency must be required to substantiate its decision to inspect certain industries, the Ninth Circuit has relied upon statistical evidence establishing a specific threshold for inclusion of a particular industry within an administrative program, while the First Circuit has not. *Compare Stoddard Lumber*, 627 F.2d at 988, *with Wollaston*, 695 F.2d at 6.

warrants predicated on self-serving but baseless assertions such as those made by EPA in this case.

C. The Seventh Circuit's Erroneous Interpretation of Section 308 of the CWA Raises a Question of First Impression And Substantial Federal Importance

It is axiomatic that EPA may only engage in inspections and sampling authorized by statute, and that the scope and purposes of an administrative plan for such activities must be consistent with the scope and purposes of that authority. *See Barlow's*, 436 U.S. at 323. In this case, the Seventh Circuit upheld sampling of Mobil's internal wastewater streams by EPA which clearly exceeded the Agency's statutory authority. By conferring virtually unbridled discretion upon EPA to inspect and seize private property, the Court of Appeals has lowered the threshold for EPA demonstrations of probable cause to a level that all but eliminates that requirement.[37]

Any analysis of EPA's authority to engage in internal sampling of a facility must begin with the language of the statute. *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 73-74 (1980). Unlike the sampling authority conferred upon EPA in some other environmental statutes,[38] EPA's authority under the Clean Water Act to inspect and sample wastewater streams at industrial facilities is limited to those "*effluents* which the owner or operator of such source is required to sample."[39] Although the term "effluent" is not specifically defined in

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[37] If magistrates believe that EPA has virtually limitless authority under section 308 to enter and sample the internal wastewater streams of industrial dischargers as the Seventh Circuit has held, they can be expected to provide little check on arbitrary EPA inspections in the future.

[38] *See* note 34, *supra*.

[39] 33 U.S.C. § 1318(a)(B)(ii) (1976) (emphasis added).

the CWA, the Act does define the term "effluent limitation."[40] Read in conjunction with the definitions of "point source"[41] and "discharge of a pollutant,"[42] an effluent limitation means a restriction upon the discharge of pollutants from a discrete and confined conveyance to navigable waters. To read the term "effluent" as used in section 308 harmoniously with the remainder of the Act, effluent must be defined as material which is discharged from a discrete and confined conveyance to navigable waters.[43]

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[40] Section 502(11) provides:

> The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

33 U.S.C. § 1362(11) (1976).

[41] Section 502(14) provides:

> The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture.

33 U.S.C. § 1362(14) (Supp. V 1981).

[42] Section 502(12) provides:

> The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

33 U.S.C. § 1362(12) (1976).

[43] *See* The Environmental Policy Division of the Congressional Research Service of the Library of Congress, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 800-01, 1274, 1304, 1494-95 (1973).

Moreover, even if the term "effluents" contained in section 308(a)(B)(ii) can be read to encompass, in limited circumstances, internal wastewater streams, the additional restriction contained in section 308(a)(B)(ii) makes plain that EPA had no authority to engage in such sampling here. Under that section, EPA is empowered to sample only those effluents "the owner or operator is required to sample." But Mobil has never been "required" to sample its internal wastewater streams. EPA has not acted pursuant to section 308(a)(A) to prescribe by rule internal sampling for point sources such as Mobil's petroleum refinery.[44] Moreover, the Illinois NPDES program,

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[44] Section 308(a)(A) provides:

> (A) the Administrator shall require the owner or operator of any point source to . . . (iii) install, use and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require.

33 U.S.C. § 1318(a)(A) (1976).

EPA has promulgated regulations to implement this statutory authority at 40 C.F.R. § 122.44(i) (1983). Under these regulations, sampling of internal wastewater streams is only required of an owner or operator if an effluent limitation is imposed on an internal wastewater stream, 40 C.F.R. § 122.44(i)(1)(iii) (1983), and such an effluent limitation can only be imposed under certain specified "exceptional circumstances." 40 C.F.R. § 122.45(i)(2) (1983). Mobil's permit does not contain any limitations on internal wastewater streams, and thus the Agency is without authority under the CWA or its implementing regulations to sample Mobil's internal wastewater streams.

In fact, EPA's authority to impose any restrictions at all on internal wastewater streams is not settled. Because the imposition of effluent limitations on internal wastewater streams conflicts with the statutory definition in section 502(11) of the CWA, EPA's authority to provide for even the limited exception set forth in 40 C.F.R. § 122.45(i)(2) was challenged in a consolidated action entitled Natural Resources Defense Council, Inc. v. EPA, No. 80-1607, in the United States Court of Appeals for the District of Columbia

which has been approved by EPA as satisfying the sampling requirements of section 308,[45] does not provide for internal wastewater stream sampling. As a consequence, Illinois issued an NPDES permit to Mobil, without objection from EPA, which only required sampling "at a point representative of discharge." That point occurs only after all treatment of Mobil's wastewater has been completed.[46] Thus, the plain meaning of section 308, read in conjunction with both EPA's and Illinois' implementation of the Act, limits EPA's sampling at Mobil's refinery to points representative of discharge subsequent to all treatment activities. And this reading of section 308 provides EPA and the states ample ability to ensure compliance by dischargers with the terms of their NPDES permits. As a result, EPA's attempt to sample wastewater streams and sludges before final treatment at points which were located inside the wastewater treatment portions of the Joliet refinery clearly exceeded the Agency's statutory authority.

Moreover, the sampling of internal wastewater streams and sludges at Mobil's refinery did not serve any of the purposes set forth in section 308 and recited in the Barney affidavit. The Barney affidavit attempts to justify the seizure of internal wastewater stream samples from Mobil's refinery by claiming the sampling data was necessary to determine compliance with permit terms and to ascertain whether additional discharge limitations should

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Circuit. Mobil was one of the many petitioners in that proceeding in which over fifty issues were raised. EPA, however, chose not to litigate this issue, among others, and a stipulation was entered stating that the issue was not ripe for litigation at that time and would be reserved for litigation at some later date.

[45] Before the Illinois program could have been approved, the Administrator of EPA was required to determine that the program contained adequate authority to ensure compliance with all applicable requirements of section 308. 33 U.S.C. 1342(b)(2)(1976).

[46] *See* text pp. 4-5 & note 4, *supra*.

be incorporated into Mobil's NPDES permit. In fact, however, it is clear that EPA can determine, and indeed in the past has determined, whether Mobil is in compliance with its NPDES permit by sampling Mobil's discharges at the points specified in that permit. It is equally clear that EPA could not use the data it obtained by sampling Mobil's internal wastewater streams to write new permit limits for the Joliet refinery or other petroleum refineries.

As discussed above, Mobil's permit requires it to sample its wastewater streams at points representative of their discharge to navigable waters. The Illinois Environmental Protection Agency, which issued Mobil's NPDES permit and has primary enforcement responsibility to monitor compliance with that permit's terms, also samples for compliance at those points. Based on its own sampling of the Joliet refinery, Illinois has consistently found Mobil's discharges to be in conformance with its permit.[47] And Illinois has never found it necessary to sample Mobil's internal wastewater streams to determine the facility's compliance status. Nor has EPA ever found such sampling necessary to determine compliance until the incident which is the subject of this case.[48] Against this background, it is clear that the first justification advanced by Mr. Barney in his affidavit was totally without basis.

Similarly, there is no basis for Mr. Barney's claim that the internal wastewater stream data were needed

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[47] Illinois sampled Mobil's discharges at the points specified in Mobil's permit during the April 1982 inspection at which EPA was denied permission to sample Mobil's internal wastewater streams. Based on its sampling, the State determined that Mobil was in full compliance with the terms of its permit. App. 41a.

[48] Indeed, EPA's own documents demonstrate that compliance inspection sampling is to be performed "at the facility's discharge and other NPDES permit-designated monitoring points." App. 93a.

for the purpose of developing additional effluent limitations for Mobil's permit. EPA can impose technology based limits in NPDES permits only if they are required by existing effluent limitations guidelines regulations,[49] or if they are developed pursuant to the Agency's asserted authority to establish case-by-case limits under section 402(a)(1) of the CWA.[50] EPA's nationally applicable BAT limitations and new source standards for the petroleum refinery point source category, which were promulgated on October 18, 1982,[51] had already been proposed and the rulemaking record closed substantially before EPA's internal sampling of the Joliet refinery took place.[52] Thus the data obtained by EPA from Mobil could not be used for that rulemaking proceeding.

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[49] Among other things, NPDES permits require point sources to comply with the applicable effluent limitations or new source performance standards established by rule under sections 301 and 306 of the Act, 33 U.S.C. §§ 1311, 1316 (1976 & Supp. V 1981), for categories of similar point sources. 33 U.S.C. § 1342(a)(1) (1976). *See* EPA v. National Crushed Stone Ass'n, 449 U.S. 64, 71 (1980); E.I. duPont de Nemours & Co. v. Train, 430 U.S. 112, 121 (1977). Effluent limitations promulgated under section 301(b) must require the application of the best practicable control technology currently available by July 1, 1977, and the application of the best available technology economically achievable (BAT) by July 1, 1983, 33 U.S.C. § 1311(b) (1976 & Supp. V 1981), while those promulgated under section 306 require new sources to comply with best available demonstrated control technology at the time they commence discharging. 33 U.S.C. § 1316(a)(1) (1976).

[50] Section 402(a)(1) of the CWA authorizes inclusion in an NPDES permit of "such conditions as the Administrator determines are necessary to carry out the provisions of this chapter," but only when the Administrator retains the authority to issue NPDES permits and does not delegate that power to the state. 33 U.S.C. § 1342(a)(1) (1976).

[51] 47 Fed. Reg. 46434 (1982).

[52] EPA gave no indication during the course of its effluent guidelines rulemaking for the oil refinery industry that it was sampling Mobil's facility for the purpose of obtaining data for use in that proceeding.

Moreover, since it is Illinois, not EPA, which issued Mobil's permit, EPA had no authority under section 402(a)(1) of the Act to impose additional limitations in that permit. EPA claims limited authority in its regulations to establish case-by-case effluent limitations for pollutants that are not controlled under applicable effluent limitations guidelines regulations.[53] However, by its terms, this regulation allows EPA to establish such limitations only in federally issued permits.[54] Thus, neither of the purposes alleged by Mr. Barney justified the sampling of internal wastewater streams at Mobil's refinery.

It is, therefore, clear that EPA had no authority under section 308 to engage in sampling of Mobil's internal wastewater streams. Since the Agency had no statutory authority to engage in such sampling, there could have been no probable cause for issuance of the warrant in this case.

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[53] *See* 40 C.F.R. § 125.3 (1983).

[54] *Id.*

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari to review the opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 14, 1983 should be granted.

Respectfully submitted,

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February 6, 1984

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Commodore Maritime Company, S.A.
Compagnie Africaine de Transport Cameroun
Compaignie D'Entreposage Communautaire
Compagnie Immobiliera (Comimmo)
Compagnie Regionale de Distribution de Produits Petroliers-C.O.R.E. Dis.
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Consortium Raymond Duez
Constructura Calle 67, Limitada
Constructora Calle 70, S.A.
Cook Inlet Pipe Line Company
CORCOP
Corrugadora de Carton, S.A.
C.R.C. Lyon Chauffage
CRCP
Cyprus Petroleum Refinery Limited
D. Muhlenbruch GmbH
D. Muhlenbruch GmbH & Co., KG
Dai Nippon Juski K.K.
Dearborn Land Company
De. Ha.—Industria Petrolifero
Depot Petrolier de Mourepiane
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Depots Petroliers de La Corse (DPLC)
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Entrepot Petrolier de Chambery
Entrepot Petrolier de Dijon
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Establissements Bouthenet
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Iranian Oil Services Limited
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Kurt Ammenn GmbH & Co. K.G.
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Kygnus Kosan Kabushiki Kaisha
Kygnus Sakiyu Kabushiki Kaisha
Kyokyto Petroleum Overseas, Ltd.
Kyokyto Sekiyu Kogyo Kabushiki Kaisha
Las Nouveaux Comptoirs Petroliers
Les Supermarches De Cote D'Ivoire
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Mediterranean Refining Company
Meentzen & Franke GmbH & Co.
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Mobil Atlas Sociedad Anonima de Capital Variable
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Mobil Comercio, Industria & Services Ltda.
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Mobil Korea Lube Oil Industries Inc.
Mobil Motor Rest AG
Mobil Nile Oil Company
Mobil Oil Cameroun
Mobil Oil Cote d-Ivoire
Mobil Oil Dahomey
Mobil Oil de Mexico, Sociedad Anonima

Mobil Oil Djibouti, S.A.
Mobil Oil Francaise
Mobil Oil Gabon
Mobil Oil Ghana Limited
Mobil Oil Haute Volta
Mobil Oil Holdings, S.A.
Mobil Oil Mali
Mobil Oil Maroc
Mobil Oil Mauritania
Mobil Oil Niger
Mobil Oil Nigeria Limited
Mobil Oil Nord-Africaine
Mobil Oil Phillippines Inc.
Mobil Oil Portuguesa, S.A.R.L.
Mobil Oil Rwanda-Burundi (S.A.R.L.)
Mobil Oil Senegal
Mobil Oil Tchad
Mobil Oil Togo
Mobilrex
Mobil Tunisie
Molinos de Carton y Papel, S.A.
Morem
Mosul Petroleum Company Limited
Motel Rest SA
Mt. Marrow Blue Metal Quarries Pty.
Ndola Oil Storage Company Limited
Near East Development Corporation
New Zealand Refining Company Limited, The
New Zealand Synthetic Fuels Corp. Ltd.
New Zealand Synthetic Fuels (Housing) Corporation Limited
Nichimo Oil (Bermuda) Co., Ltd.
Nichimo Sekiyu Seisei Kabushiki Kaisha
Nippon Unicar Company Limited
Norddeutsche Erdgas-Aufbereitungs GmbH
Nordic Storage Company Ltd.
Nottingham Gas Limited
N.V. Rotterdam-Rijn Pijpleiding Maatschappij

N.V. Socony-Standard-Vacuum Oil Company
Occidental de Empaques, Ltda.
Octel Associates
Oil Kol (Proprietary) Limited
Oil Service Company of Iran (Private Company)
Oldenburgische Erdoel Gesellschaft mit beschrankter Haftung
Olympic Pipe Line Company
Osage Pipe Line Company
P.T. Arun Natural Gas Liquefaction Company
P.T. Stanvac Indonesia
Paloma Pipe Line Company
Pars Investment Corporation
Pembalta Gas System No. 1 Ltd.
Pembalta Gas System No. 3 Ltd.
Pembalta Gas System No. 4 Ltd.
Pembalta Gas System No. 5 Ltd.
Pembalta Gas System No. 6 Ltd.
Perretti Petroli S.p.A.
Petrocab
Petrogas Processing Ltd.
Petroleum Development (Cyprus) Limited
Petroleum Refineries (Australia) Proprietary Limited
Petroleum Services (Middle East) Limited
Petroleum Tankship Company Inc.
Petromin Lubricating Oil Company
Petromin-Mobil Yanbu Refinery Company Ltd.
Pip Line Banal de La Goulette
Flagadizos para la Industria S.A.
Poly Oil Chimie (P.O.C.)
Prespak (Proprietary) Limited
Qatar Petroleum Company Limited
Qualbank, Inc.
Rainbow Pipe Line Company, Ltd.
Randhurst Corporation
Reforestadora Andina, S.A.
Reforestadora del Cauca, S.A.
Rhodes Petroleum Installation S.A.

Rivere Court Estates, Limited
Rohel-Aufsuchunga Gasellschaft mbH
Ruhrgas Aktiengesellschaft
S&M Pipeline Limited
S. A. Ets. Georga DUBOIS
S. A. Mas & Cie
S.A.M. Lebreton
Samarco (Alpha) Shipping Company
Samarco (Beta) Shipping Company
Sanwa Kasei Kogyo Kabuskiki Kaisha
SARL Garage Pineau
Sarni S.p.A.
Saudi Arabian Maritime Company
Saudi Can Company, Ltd., The
Saudi Chemical Industries Company Limited
Saudi Maritime Company Ltd.
Saudi Tankers Limited
Saudi Yanbu Petrochemical Company
Schubert Kommanditgesellschaft
S.C.I. Du Fonds Du Val
Segher de Mexico, S.A. de C.V.
Seibu Kygous Sekiyu Hambai Kabushiki Kaisha
SENERCO
Seram Societa per Azioni (S.p.A.)
Sierra Leone Petroleum Refining Company Limited, The
R. Simonnet & CIE.
Societdade Portugal Marrocos SARL
Societa Iatliana per l'Oleodette Transalpino, S.p.A.
Societe Africaine de Raffinage
Societe Agicole Des Entreprises Petroliares (S.A.D.E.P.)
Societe Alfred Ott & Cie
Societe Belge de Transport par Pipeline S.A.
Societe Camerounaise des Depots Petroliers (S.C.D.P.)
Societe Camerounaise Equatoriala De Fabrication De Lubrifiants "S.C.E.F.L."
Societe Civile de Mustapha
Societa Civile Immobiliere Courselles-Etoile

Societe Civile Immobiliere de Construction de 34 Avenue de General Leclerc a Boisay-St-Leger
Societe Civile Immobiliere de Construction "La Residence Brune"
Societe Civile Immobiliere de 10 Bd. de la Republique A La Garenne-Colombes
Societe Civile Immobiliere Klaber-Etoile
Societa Civile Immobiliere La Fontaine Sait Lucien
Societe Civile Immobiliere Mobil
Societe Dahomeenne d'Entraposage de Produits Petroliers
Societe d'Armement Fluvial et Maritime "SOFLUMAR"
Societe de Construction & de Gastion CB 12
Societe de Distribution Gastelroussine (SODICA)
Societe de Gaz D'Oceanic (SOGADOC)
Societe de Manutention de Carburants Aviation (S.M.C.A.)
Societe de Manutention de Carburants Aviation Dakar-Yoff
Societe de Manutention de Carburants Aviation de Tahiti (SOMCAT)
Societe de Maperialx d'Etancheite Pour Le Entreprises (Maple)
Societe d'Entreposage de Bobo-Dioulasso (S.E.B.)
Societe d'Entreposage d'Hydrocarbures de Bingo (SEHBI)
Societe d'Entreposage de San Pedro (SESP)
Societe d'Entreposage Petrolier au Burundi
Societe de Renovation D'Embaliage Metalliques (REM)
Societe d'Habitations a Loyer Modere de al Seine Maritime
Societe des Bitumes at Cut-Backs du Cameroun
Societe des Establissements Goux
Societe Des Huiles Lemahieu
Societe de Pipe-Line Sud-European
Societe Francaise Stoner-Mudge
Societe Gabonaise d'Entreposage de Produits Petroliers
Societe Gobanaise de Raffinage

Societe Industrielle des Asphaltes at Petroles de Lataquie (Syria) S.A.
Societe Jean Roussel S.A.
Societe Ivoirienne de Fabrication de Lubrifiante (S.I.F.A.L.)
Societe Ivoirienne de Raffinage
Societe Mauritanienne d'Entreposage de Produits Petroliers
Societe Nationale de Raffinage (Sonara)
Societe Nouvelle Raffinerie Meridionale De Ceresines (RMC)
Societe Novodis
Societe Pizo De Formulation De Lubrifiants (PIZOLUB)
Societe Regionale De Produits Petroliers
Societe Regionale de Produits Energetiques
Societe Rahitienne de Depota Petroliers
Societe Tchadienne D'Entreposage de Produits Petroliers
Societe Togolaise d'Entreposage (STE)
SOMODIP
Sonarep (South Africa) (Proprietary) Limited
SONEX
South African Oil Refinery (Proprietary) Limited
South Saskatchewan Pipe Line Company
South West Africa Road Binders (Proprietary) Limited
Statfjord Transport A.S.
Station-Service Lunas
Sydney Metropolitan Pipeline Pty. Ltd.
Syria Petroleum Company Limited
T.R. Miller Mill Company, Inc.
Tanklagergeselischaft Koln-Bonn
Tecklenburg GmbH
Tecklenburg GmbH & Co. Energiebedarf K.G.
Texoma Pipe Line Company
Thailand Lubricant Products, Limited
Thailand Solvent Products, Ltd.
Thums Long Beach Company
Toa Manryo Kogyo Kabushiki Kaisha
Tohko Plastics Co., Ltd.

Tonen Energy International Corp.
Tonen Sekiyu Kagaku Kabushiki Kaisha
Tonen Kanker Kabushiki Kaisha
Tonen Technology Kabushiki Kaisha
Total Centrafricaine de Gestion (TOCAGES)
Toulouse-Distribution Produits Petroliers
Toyoshina Film Co., Ltd.
Tradewind Film Co., Ltd.
Tradewind Maritime Co., S.A.
Transalpine Finance Holdings S.A.
Transalpine Oelleitung in Ooesterreich Gessellschaft m.b.H.
Trans-Arabian Pipe Line Company
Transgas Umachlege-Lager-Und Transport Gesellschaft MbH
Turkish Petroleum Company Limited
Twifo Oil Plantations Ltd.
UBAG Unterflur Betankungsanlega Flughafan Zurich
Union Grafica, S.A.
United Kingdom Oil Pipelines Limited
W.A.G. Pipeline Pry. Ltd.
Wako Kasei Kabushiki Kaisha
Wakohjushi Kabushiki Kaisha
Walton, Gatwick Pipeline Company Limited
Werner Weidemann Mineraloelvertich G.m.b.H.
West Shore Pipe Line Company
Wolverina Pipe Line Company
WSG, Warmeservice Gmbh
Wyco Pipe Line Company
Zaire Mobil Oil
Zaire Services Des Entreprises Petrolieras

83-1290

No. 83-——

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MOBIL OIL CORPORATION,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and VALDUS ADAMKUS, REGIONAL ADMINISTRATOR, REGION V, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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February 6, 1984

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APPENDIX

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UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 83-1047

MOBIL OIL CORPORATION, a corporation,
Plaintiff-Appellant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and VALDUS ADAMKUS, REGIONAL ADMINISTRATOR, REGION V, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendants-Appellees.

Argued April 7, 1983

Decided Sept. 14, 1983

Thomas D. Allen, Wildman, Harrold, Allen & Dixon, Chicago, Ill., for plaintiff-appellant.

Robert L. Klarquist, Dept. of Justice, Washington, D.C., for defendants-appellees.

Before CUMMINGS, Chief Judge, COFFEY, Circuit Judge, and WEIGEL, Senior District Judge.*

CUMMINGS, Chief Judge.

This appeal involves a dispute over the scope of authority the United States Environmental Protection Agency ("EPA") enjoys to sample streams of industrial

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* The Honorable Stanley A. Weigel, Senior District Judge for the Northern District of California, is sitting by designation.

waste that run from a petroleum refinery into a nearby navigable river.

Plaintiff-appellant Mobil Oil Corporation ("Mobil") operates a petroleum refinery near the Des Plaines River, a navigable river in Illinois. Exercising power delegated to it by the EPA, the Illinois Environmental Protection Agency issued Mobil a permit to dump limited amounts of specified pollutants into that river. Among other things, the permit requires that Mobil monitor the amount of pollutants it dumps into the river by regularly testing samples from the refinery's waste streams "taken at a point representative of discharge" into the river and that it periodically report those test results to the EPA. Because Mobil treats its waste before dumping it into the river, presumably to bring the level of pollutants within the limits prescribed in the permit, the point in the waste streams "representative of discharge" into the river occurs after the waste has been treated.

In April of 1982, one of the EPA's engineers requested Mobil's permission to collect samples of both treated and untreated waste water from waste streams at Mobil's refinery. Mobil granted permission to take samples of its treated waste water but refused permission to take samples of its untreated waste water. Four months later the EPA obtained an administrative warrant to collect the unpermitted samples. Mobil's motion to quash the warrant was denied by a magistrate and Mobil thereupon appealed to the district judge and also filed an action in the district court for a permanent injunction prohibiting the EPA from further executing the warrant and requiring it to return to Mobil the samples already taken and all information gathered therefrom. The district court ultimately dismissed Mobil's suit with prejudice and denied its appeal from the magistrate's ruling on its motion to quash. This appeal followed; for the reasons that follow, we affirm.

The EPA claims that Section 308(a) of the Federal Water Pollution Control Act, 33 U.S.C. § 1318(a)[1] authorizes it to sample Mobil's untreated waste water. Of course we must give great deference to an agency's interpretation of the statute which it administers. *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616; *Public Service Co. of Indiana v. United States En-*

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[1] Section 308 provides in pertinent part:

(a) Whenever required to carry out the objective of this chapter, including but not limited to (1) developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance under this chapter; (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance; (3) any requirement established under this section; or (4) carrying out sections 305, 311, 402, 404 (relating to State permit programs), and 504 of this Act—

(A) the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require; and (B) the Administrator or his authorized representative, upon presentation of his credentials—

(i) shall have a right of entry to, upon, or through any premises in which an effluent source is located or in which any records required to be maintained under clause (A) of this subsection are located, and

(ii) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under clause (A), and sample any effluents which the owner or operator of such source is required to sample under such clause.

The Act is popularly known as the Clean Water Act and will be so termed throughout this opinion.

vironmental Protection Agency, 682 F.2d 626, 632 (7th Cir. 1982). Paragraph (a)(B) of that Section gives the EPA administrator, or an authorized representative, a right of entry upon any premises "in which an effluent source is located" and authorizes him to "sample any effluents which the owner or operator of such source is required to sample . . . ." The EPA claims that each waste stream that flows from Mobil's petroleum refinery to the Des Plaines River is effluent both before and after it is treated and that it is the same effluent before it has been treated as it is after. Mobil disagrees. It claims, first, that the term "effluent" refers only to the waste water that ends up in the Des Plaines River and argues that because some of the pollutants in the waste water it treats do not end up in the river, none of its waste water is "effluent" until after it has been treated. Mobil claims second that because treatment alters the composition of waste water, even if a waste water stream is "effluent" before it is treated, it is not the same "effluent" as it is after it is treated. Since Mobil's permit only requires it to sample treated waste water, Mobil argues that the only "effluent" the EPA may sample is treated waste water.

It is not necessary to become expert in the metaphysics of waste water to respond to Mobil's arguments. All that is necessary is to identify what interest Mobil has in preventing the EPA from sampling untreated waste water, what interest the EPA has in getting those samples, and then to inquire whether Congress somehow balanced those interests when it enacted Section 308, or if not, how Congress would likely have balanced them had it undertaken to do so. Mobil of course has an interest in keeping strangers, including EPA officials, off the land on which its refinery is situated. That interest is not at stake here, however, because paragraph (a)(B) of Section 308 (33 U.S.C. § 1318(a)(B)) gives the EPA a right of entry onto that land. (Mobil does not claim that the EPA unreasonably exercised that right in this case.) There is no

question that the EPA has a right to enter Mobil's refinery; the only question is once it is there, has it the power to collect samples of untreated waste water? Mobil undoubtedly has an interest in preventing any activity that disrupts the daily operating routine at its refinery, and it is conceivable if unlikely that the collection of waste water samples by EPA officials might occasionally interfere with that routine. But Mobil admits that the EPA has the power to collect samples of its treated waste water and there is no reason to suppose, indeed Mobil does not claim, that sampling of untreated waste water interferes more with operations at its refinery than does sampling of treated waste water. Moreover, paragraph (a)(B)(ii) of Section 308 gives the EPA power to inspect records Mobil maintains and equipment it uses to monitor the flow of pollutants from its refinery, and it is difficult to imagine how it could be more inconvenient for Mobil to allow EPA officials to inspect its books and equipment than to allow them to sample some of its waste water. See note 1 *supra*. In addition, the preface to Section 308(a) states that the objective of the Act includes "developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance" and in order to develop an intelligent effluent limitation for a particular permittee, information is necessary to determine how efficiently the permittee is treating the water, which obviously requires a sample of water both before and after the treatment.

It appears then that the only interest Mobil could possibly have in preventing EPA officials from sampling its untreated waste water is that Mobil might want to keep the EPA in the dark as much as possible about what pollutants are present in the water it dumps into the Des Plaines River and about how efficient its treatment processes are at cleaning its waste water of pollutants. Treatment of waste water may mask the presence of a pol-

lutant. It is easier for the EPA to measure accurately the level of pollutants in waste water after it has been treated if it knows the level of pollutants in that waste water before it has been treated; presumably, it can devise tests more sensitive to those pollutants. And if the EPA is to assess with any reasonable degree of accuracy how efficient Mobil's treatment processes are, it needs to know what pollutants are present in waste water before it is treated as well as after it has been treated.

Any interest Mobil may have in frustrating the EPA's efforts to assess the efficiency of its treatment processes and to detect trace amounts of toxic pollutants in waste water it dumps into the Des Plaines River is not entitled to protection. Section 301(a) of the Clean Water Act (33 U.S.C. § 1311(a)) prohibits the discharge by any person of any pollutant into the nation's navigable waters except that which the EPA expressly permits, and Section 10(a)(1) expressly adopts as one of our nation's goals the elimination of the discharge of all water pollutants by the year 1985 (33 U.S.C. § 1251(a)(1)). Policing compliance with EPA pollution standards is critical to the achievement of this ambitious goal, and Section 308(a) eliminates any doubts on that score by expressly authorizing the EPA to check whether someone, such as Mobil, holding a permit to pollute is complying with the pollution limits set forth in its permit. Note 1 *supra*. Sampling waste water both before and after it is treated is an effective, perhaps the most effective, means of doing that. The EPA also has a legitimate need for information regarding the efficiency of waste treatment systems. Section 301(b)(2)(A) of the Act (33 U.S.C. § 1311(b)(2)(A)) requires the EPA to set limits upon the level of water pollution by a permit holder like Mobil such that the permit holder will be required to employ the "best available technology economically achievable . . . which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants." Information about what pollutants are in Mobil's waste

water streams before the streams are treated allows the EPA to meet that obligation. Thus Section 308(a) also expressly authorizes the EPA to collect samples whenever required to develop new permit limits on the discharge of pollutants. These provisions of Section 308(a) leave no doubt that the Congress that enacted that Section was firmly convinced that the interest of permit holders such as Mobil in keeping secret information about the pollutants in its waste water is not entitled to protection. We note finally, for purposes of analogy, that the Clean Air Act contains a section almost identical to Section 308(a)[2] and that last year this Court refused to quash a warrant as broad, if not broader, than the warrant issued in this case. See *Public Service Co. v. United States Environmental Protection Agency*, 682 F.2d 626, 638 (7th Cir. 1982), affirming 509 F.Supp. 720 (S.D.Ind. 1981), certiorari denied, —— U.S. ——, 103 S.Ct. 762, 74 L.Ed. 2d 977.

Mobil makes one other attack on the EPA's authority. Mobil suggests that the EPA should have held some sort of public hearing before it obtained a writ to sample Mobil's untreated waste water. Mobil claims that no EPA regulation authorizes the EPA to conduct such sampling, and presumably the point of any hearing in this case would be to obtain public authorization for such sampling. Though we doubt that any form of public authorization is necessary—Section 101(e) of the Act (33 U.S.C. § 1251(e)) provides only that "[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the [EPA] Administrator or any State * * * shall be provided for, encouraged, and assited by the Administrator and the States," and it is doubtful whether sampling of waste water qualifies as a "regulation, standard, effluent limitation, plan, or pro-

[2] See Section 114 of the Clean Air Act (42 U.S.C. § 7414).

gram"—Mobil is mistaken in its claim. Section 122.7 (i)(4) of Title 40 of the Code of Federal Regulations, in effect when Mobil was granted its permit and which no party cited in their briefs or during oral argument,[3] expressly provides that "[t]he permittee shall allow the Director [of the EPA program] * * * to * * * (4) Sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by the appropriate Act, any substances or parameters at any location." Public comment was solicited before this regulation was adopted and therefore whatever public authorization Mobil seeks was already sought.

Judgment affirmed.

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[3] Mobil did cite 40 C.F.R. § 122.63(i)(2). That provision, however, merely governs the setting of "effluent limitations or standards" upon untreated waste water streams. It does not preclude sampling of untreated waste streams to police compliance with effluent limitations upon treated waste water streams.

U.S. DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

No. 82-C-5441

MOBIL OIL CORPORATION,
Plaintiff

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Defendants

Dec. 28, 1982

WATER

Federal, state, and local regulation—Constitutionality (§ 28.03)

Federal, state, and local regulation—Statutory construction—In general (§ 28.051)

Federal, state, and local regulation—Effluent standards (§ 28.15)

Federal, state, and local regulation—Administrative agencies—Procedure before agencies (§ 28.621)

Environmental Protection Agency legally inspected and sampled internal waste streams on oil facility's premises because (1) inspection was conducted pursuant to valid warrant, (2) internal waste streams are effluents under Section 308 of Clean Water Act, and (3) inspection was not in violation of search and seizure clause of Fourth amendment to U.S. Constitution.

STATUTES

Federal—Federal Water Pollution Control Act—Effluent standards (§ 95.0212)

Construed.

Motion to dismiss action for declaratory and injunctive relief against Environmental Protection Agency's inspection of oil facility's internal waste streams; granted.

Thomas D. Allen, James M. Mulcahy, and Elsie E. Singer, Chicago, Ill., and Nelson S. Anthony and Arthur G. Hofmann, Schaumburg, Ill., for plaintiff.

Dan K. Webb, U.S. Attorney, Edward J. Moran, Assistant U.S. Attorney, Chicago, Ill., Robert M. Anderson, Barbara Magel, and David M. Sims, EPA Region V, Chicago, Ill., for defendants.

Before J. Sam Perry, District Judge.

Full Text of Opinion

FINAL ORDER AND JUDGMENT

The above-captioned matter came on for hearing respecting plaintiff's (Mobil) Motions for a Temporary Restraining Order, Preliminary Injunction, and other relief on September 3, 1982. In conjunction with these Motions, Mobil had also filed an appeal of Federal Magistrate Sussman's denial of plaintiff's Motion to Quash the warrant at issue in this case, and a civil action for Declaratory Judgment and Permanent Injunction against the United States Environmental Protection Agency, Region V (EPA) *et al.* Mobil Oil requested this Court, *inter alia* to declare that EPA's inspection of Mobil's facility at Channahon, Illinois, conducted pursuant to a warrant, on August 30, 1982 to September 2, 1982, was illegal, beyond the scope of section 308 of the Clean Water Act, 33 U.S.C. § 1318 (1977), (Act), and unconstitutional under the Fourth Amendment search and seizure clause. Mobil Oil alleges that EPA has no authority under the Clean Water Act to sample internal waste streams located on Mobil Oil property at any points other than the final point of discharge of those streams to navigable waters. EPA's purpose in conducting the inspection and sampling program was to obtain information which may be necessary for the

development of effluent limitations that require the application of best available technology economically achievable (BAT) or best practicable control technology (BPT) pursuant to sections 301 and 304 of the Clean Water Act, and to monitor Mobil Oil's compliance with other environmental requirements under the Act.

At the time of the hearing on the Temporary Restraining Order and Preliminary Injunction, all parties agreed in open Court that there was no dispute as to material facts in the case and that the sole questions presented were issues of law. This Court established a briefing scheduled to be followed by the parties in an Order dated September 7, 1982. Defendant EPA filed a timely Motion to Dismiss the complaint for failure to state a claim upon which relief could be granted, together with its supporting memorandum and brief on the merits of the case. After having considered all the pleadings and memoranda filed by both parties to this case, and having been fully advised in the premises, it is hereby ORDERED, ADJUDGED, and DECREED the following:

1. The Administrator of the United States Environmental Protection Agency or his duly authorized representative, upon presentation of his credentials, has the statutory authority pursuant to Section 308 of the Clean Water Act, 33 U.S.C. § 1318, to collect, or obtain from an owner or operator, samples of internal waste streams in accordance with such methods, at such locations, and in such manner as the Administrator shall prescribe.

2. That the inspection and sampling program conducted by EPA, Region V, at Mobil Oil's Channahon, Illinois facility from August 30, 1982 to September 2, 1982 was authorized by a valid warrant, and by Section 308 of the Clean Water Act, 33 U.S.C. § 1318. Said inspection was legal, proper, and justified, as well as consistent with all applicable requirements of law including Section 308 of the Clean Water Act and the Fourth Amendment to the United States Constitution.

3. The term "effluent" as used throughout the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, includes waste streams which flow out of industrial facilities, or out of equipment within such facilities, and which ultimately are discharged, either after being treated or otherwise, to navigable waters or publicly owned treatment works.

4. The internal waste streams sampled by EPA at Mobil Oil's Channahon, Illinois facility were "effluents" within the meaning of the Clean Water Act, and Section 308 of the Clean Water Act in particular, 33 U.S.C. § 1318.

5. The Administrator of the U.S. EPA or his duly authorized representative, upon presentation of his credentials, has the statutory authority, pursuant to Section 308 of the Clean Water Act, 33 U.S.C. § 1318, to sample any effluents, at any location, whether point source discharges, discharges to a publicly owned treatment works, or internal waste streams, without having first requested an owner operator of that facility to sample those same effluents. In any event, in this case, EPA's request that Mobil Oil submit samples to the Agency in lieu of any EPA-conducted inspection at the Channahon facilities was rejected by the plaintiff, Mobil Oil Corporation.

WHEREFORE, based on the preceding declarations and judgments, and for the reasons stated in defendants' Memorandum in Support of Motion to Dismiss, it is further ORDERED,

ADJUDGED and DECREED:

1. That defendants' Motion to Dismiss for failure to state a claim is hereby GRANTED in its entirety;
2. Plaintiff's complaint for Declaratory Judgment and other relief is hereby DISMISSED with prejudice;
3. Plaintiff's Motions for Temporary Restraining Order and Preliminary Injunction and other relief are DENIED;

4. Plaintiff's Appeal of Magistrate Sussman's denial of Mobil's Motion to Quash Warrant is DENIED; and

5. This Court's Order of September 7, 1982 is hereby dissolved.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 8, 1983

Before

HON. WALTER J. CUMMINGS, *Chief Judge*
HON. JOHN L. COFFEY, *Circuit Judge*
HON. STANLEY A. WEIGEL, *Senior District Judge* *

No. 83-1047

MOBIL OIL CORPORATION, a corporation,
Plaintiff-Appellant,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 82-C-5441—J. Sam Perry, Judge

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by plaintiff-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

---

* The Honorable Stanley A. Weigel, Senior District Judge for the Northern District of California, is sitting by designation.

NPDES Permit No. IL0002861

Illinois Environmental Protection Agency
Division of Water Pollution Control
2200 Churchill Road
Springfield, Illinois 62706

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

Reissued (NPDES) Permit

Issue Date: December 11, 1980
Effective Date: Jan. 11, 1981

Expiration Date:	June 30, 1981
Permittee:	Mobil Oil Corporation
Location:	SE of intersection of I55 and the Des Plaines River, near Joliet (Will County)
Receiving Waters:	Des Plains River to Illinois River

In compliance with the provisions of the Illinois Environmental Protection Act, the Chapter 3 Rules and Regulations of the Illinois Pollution Control Board, and the FWPCA, the above-named permittee is hereby authorized to discharge at the above location to the above-named receiving stream in accordance with the standard conditions and attachments herein.

Permittee is not authorized to discharge after the above expiration date. In order to receive authorization to discharge beyond the expiration date, the permittee shall submit the proper application as required by the Illinois Environmental Protection Agency (IEPA) not later than 180 days prior to the expiration date.

/s/ Thomas G. McSwiggin
THOMAS G. MCSWIGGIN, P.E.
Manager, Permit Section
Division of Water Pollution Control

TGM:YVS:bl/sp/2927

ATTACHMENT B 1

Final

Effluent Limitations and Monitoring

Discharge Number: 001

Discharge Name: Total discharge from Process Treatment Plant

From effective date of this permit until June 30, 1981, the effluent of the above discharge shall be monitored and limited at all times as follows:

PARAMETER	Concentration Limits mg/1		Load Limits lbs/day (Kg/day)		Sample Frequency	Sample Type
	30 Day Average	Daily Maximum	30 Day Average	Daily Maximum		
Flow (MGD)					Daily	Continuous
Effluent BOD_5	20	50	600.56 (272.6)	1722.1 (781.8)	5/week	Composite
Effluent SS	25	62.5	750.7 (340.8)	2135.9 (969.7)	5/week	Composite
Effluent Ammonia Nitrogen as (N)	See Attachment G—Special Conditions				5/week	Composite
Effluent pH	See Attachment B 1—Continued				5/week	Grab
COD			11803.4 (5358.7)	22746.12 (10326.7)	5/week	Composite

Oils, Fats & Greases	15	30	448.86 (203.8)	922.14 (418.6)	1/week	Mathetical Composite
Phenols		.3	8.9 (4.0)	10.26 (4.65)	5/week	Composite
Zinc		1.0	29.9 (13.6)	34.2 (15.5)	2/week	Composite
Lead		.1	3.0 (1.36)	3.4 (1.5)	2/week	Composite
Chromium (Total Hexavalent)		.3	1.72 (.78)	3.69 (1.67)	2/week	Composite
Chromium Total		—	27.05 (12.28)	46.12 (20.94)	2/week	Composite
Mercury		.0005	.015 (.007)	.017 (.008)	2/week	Composite
Sulfide		—	8.9 (4.04)	19.98 (9.07)	5/week	Composite
Total Dissolved Solids	See Attachment B 1—Continued				2/week	Composite
Cyanide, Total	See Attachment G—Special Conditions				2/week	Composite

ATTACHMENT B 1 CONTINUED

1. The pH shall be in the range 6.0 to 9.0.

2. Total dissolved solids shall not be increased more than 750 mg/1 above background concentration levels unless caused by recycling or other pollution abatement practices, and in no event shall exceed 3,500 mg/1 at any time.

3. Samples taken in compliance with the effluent monitoring requirements shall be taken at a point representative of discharge but prior to mixing with other effluent streams.

4. The permittee shall record monitoring results on Discharge Monitoring Report Forms using one such form for each discharge each month.

5. The completed Discharge Monitoring Report forms shall be submitted to IEPA and postmarked no later than the 15th day of the following month, unless otherwise specified by the permitting authority.

   Discharge Monitoring Reports shall be mailed to the IEPA at the following address:

   Illinois Environmental Protection Agency
   Division of Water Pollution Control
   2200 Churchill Road
   Springfield, Illinois 62706

   Attention: NPDES Unit (DMR)

6. Additionally, Discharge Monitoring Report forms shall be mailed to United States Environmental Protection Agency in Chicago on a quarterly basis. The permittee shall submit the reports as follows, unless otherwise specified by the permitting authority.

ATTACHMENT B 1 CONTINUED

Period	Report Due At U.S. Environmental Protection Agency
Jan, Feb, Mar	April 28th
April, May, June	July 28th
July, Aug, Sept	October 28th
Oct, Nov, Dec	January 28th

Reports shall be addressed to United States Environmental Protection Agency as follows:

NPDES Compliance Unit
United States Environmental Protection Agency
Region V
230 South Dearborn Street
Chicago, Illinois 60604

The Permittee shall also notify the United States Environmental Protection Agency of any excursions as required by Standard Condition Number 12.

ATTACHMENT B1a

Effluent Limitations and Monitoring

Discharge Number(s): 001a

Discharge Name(s): Sanitary Unit Discharge

From effective date of permit until June 30, 1981, the effluent of the above discharge(s) shall be monitored and limited at all times as follows:

	Concentration Limits mg/1			Load Limits lbs/day (Kg/day)				
Parameter	30 Day Avg.	7 Day Avg.	Daily Max.	30 Day Avg.	7 Day Avg.	Daily Max.	Sample Frequency	Sample Type
Fecal Coliform	See Attachment B1a—Continued						2/week	Grab
Total Residual Chlorine							2/week	Grab

1. The daily maximum fecal coliform count shall not exceed 400 per 100 ml.
2. Samples taken in compliance with the effluent monitoring requirements shall be taken at a point representative of the discharge, but prior to its combination with the process water.
3. The permittee shall record monitoring results on Discharge Monitoring Report Forms using one such form for each discharge each month.

   The completed Discharge Monitoring Report forms shall be submitted to IEPA, postmarked no later than the 15th day of the following month, unless otherwise specified by the permitting authority.

   Discharge Monitoring Reports shall be mailed to the IEPA at the following address:

   Illinois Environmental Protection Agency
   Division of Water Pollution Control
   2200 Churchill Road
   Springfield, Illinois 62706

   Attention: NPDES Unit (DMR)

ATTACHMENT B1a CONTINUED

Additionally, Discharge Monitoring Report forms shall be mailed to United States Environmental Protection Agency in Chicago on a quarterly basis. The permittee shall submit the reports as follows, unless otherwise specified by the permitting authority.

Period	Report Due At U.S. Environmental Protection Agency
Jan, Feb, Mar	April 28th
April, May, June	July 28th
July, Aug, Sept	October 28th
Oct, Nov, Dec	January 28th

Reports shall be addressed to United States Environmental Protection Agency as follows:

NPDES Compliance Unit
United States Environmental Protection Agency
Region V
230 South Dearborn Street
Chicago, Illinois 60604

The Permittee shall also notify the United States Environmental Protection Agency of any excursions as required by Standard Condition Number 12.

ATTACHMENT B 2

Final

Effluent Limitations and Monitoring

Discharge Number: 002

Discharge Name: Non-contact Cooling Water Discharge

From the effective date of this permit until June 30, 1981, the effluent of the above discharge shall be monitored and limited at all times as follows:

	Concentration Limits mg/l		Load Limits lbs/day (Kg/day)			
Parameter	30 Day Average	Daily Maximum	30 Day Average	Daily Maximum	Sample Frequency	Sample Type
Flow (MGD)					Daily	Continuous
TOC	See Attachment B 2—Continued				2/week	Composite
Temperature	See Attachment G—Special Conditions				2/week	Grab

1. The pH shall be in the range 6.0 to 9.0.
2. Samples taken in compliance with the effluent monitoring requirements shall be taken at a point representative of discharge but prior to mixing with other effluent streams.
3. For the purpose of this permit, this discharge is limited to non-contact cooling water, free from process and other wastewater discharges. In the event that the permittee shall require the use of water treatment additives, the permittee must request a change in this permit in accordance with the Standard Conditions—Attachment H.
4. Permittee shall monitor influent and effluent TOC. Net TOC discharged shall not exceed 5 mg/l.

ATTACHMENT B 2 CONTINUED

5. The permittee shall record monitoring results on Discharge Monitoring Report Forms using one such form for each discharge each month.

6. The completed Discharge Monitoring Report forms shall be submitted to IEPA and postmarked no later than the 15th day of the following month, unless otherwise specified by the permitting authority.

   Discharge Monitoring Reports shall be mailed to the IEPA at the following address:

   Illinois Environmental Protection Agency
   Division of Water Pollution Control
   2200 Churchill Road
   Springfield, Illinois 62706

   Attention: NPDES Unit (DMR)

7. Additionally, Discharge Monitoring Report forms shall be mailed to United States Environmental Protection Agency in Chicago on a quarterly basis. The permittee shall submit the reports as follows, unless otherwise specified by the permitting authority.

Period	Report Due At U.S. Environmental Protection Agency
Jan, Feb, Mar	April 28th
April, May, June	July 28th
July, Aug, Sept	October 28th
Oct, Nov, Dec	January 28th

   Reports shall be addressed to United States Environmental Protection Agency as follows:

   NPDES Compliance Unit
   United States Environmental Protection Agency
   Region V
   230 South Dearborn Street
   Chicago, Illinois 60604

   The Permittee shall also notify the United States Environmental Protection Agency of any excursions as required by Standard Condition Number 12.

ATTACHMENT B 3

Final

Effluent Limitations and Monitoring

Discharge Number: 003

Discharge Name: Stormwater Discharge

From the effective date of this permit until June 30, 1981, the effluent of the above discharge shall be monitored and limited at all times as follows:

	Concentration Limits mg/l		Load Limits lbs/day (Kg/day)			
Parameter	30 Day Average	Daily Maximum	30 Day Average	Daily Maximum	Sample Frequency	Sample Type
Flow (MGD)					When Discharging	Continuous
Effluent pH	See Attachment B 3—Continued				When Discharging	Grab
Oil & Grease		15			When Discharging	Mathematical Composite
TOC		35			When Discharging	Composite

1. The pH shall be in the range 6.0 to 9.0.
2. Samples taken in compliance with the effluent monitoring requirements shall be taken at a point representative of discharge but prior to mixing with other effluent streams, when discharging.
3. For the purpose of this permit, this discharge is limited to uncontaminated storm water, free from process and other wastewater discharges. In the event that the permittee shall change the constituents of this waste stream, the permittee must request a change in this permit in accordance with the Standard Conditions—Attachment H.
4. The permittee shall record monitoring results on Discharge Monitoring Report Forms using one such form for each discharge each month.

ATTACHMENT B 3 CONTINUED

5. The completed Discharge Monitoring Report forms shall be submitted to IEPA and postmarked no later than the 15th day of the following month, unless otherwise specified by the permitting authority.

   Discharge Monitoring Reports shall be mailed to the IEPA at the following address:

   Illinois Environmental Protection Agency
   Division of Water Pollution Control
   2200 Churchill Road
   Springfield, Illinois 62706

   Attention: NPDES Unit (DMR)

6. Additionally, Discharge Monitoring Report forms shall be mailed to United States Environmental Protection Agency in Chicago on a quarterly basis. The permittee shall submit the reports as follows, unless otherwise specified by the permitting authority.

Period	Report Due At U.S. Environmental Protection Agency
Jan, Feb, Mar	April 28th
April, May, June	July 28th
July, Aug, Sept	October 28th
Oct, Nov, Dec	January 28th

   Reports shall be addressed to United States Environmental Protection Agency as follows:

   NPDES Compliance Unit
   United States Environmental Protection Agency
   Region V
   230 South Dearborn Street
   Chicago, Illinois 60604

   The Permittee shall also notify the United States Environmental Protection Agency of any excursions as required by Standard Condition Number 12.

ATTACHMENT G

Special Conditions

1. The effluent total dissolved solids & ammonia nitrogen concentration in the subject discharge shall be limited to a level that will not cause the receiving stream to exceed the water quality standard in Rule 203 of the Illinois Pollution Control Board, Chapter 3, Rules and Regulations.

2. By Order of the Pollution Control Board (PCB 80-54), Mobil Oil Corporation has been granted a variance from the Chapter 3, Rule 406 effluent ammonia limitation for Mobil's petroleum refinery in Will County, Illinois until July 1, 1982.

   Under the terms of that variance, the Permittee shall be allowed to discharge ammonia (as N), not to exceed the following, until the permit expiration date, June 30, 1981.

Concentration Limits mg/1		Load Limits (In pounds/day) (Kg/day)	
30 Day Average	Daily Maximum	30 Day Average	Daily Maximum
25	40	889 (403.2)	1957 (888.5)

3. The following shall apply to #001 and #002, respectively.

A. The permittee shall monitor and report the following listed parameters at 6 month intervals. The sample shall be a 24-hour effluent composite except as otherwise specifically provided below and the results shall be submitted with the monitoring reports for January and June to both IEPA and USEPA unless otherwise specified by the permitting authority. The parameters to be sampled are:

Arsenic (total)
Barium (total)
Cadmium (total)

ATTACHMENT G CONTINUED

Chromium (total hexavalent)
Chromium (total trivalent)
Copper (total)
Cyanide
Fluoride (total)
Iron (total)
Iron (dissolved)
Lead (total)
Manganese (total)
Mercury (total)
Nickel (total)
Oil, fats and greases*
Phenols
Selenium (total)
Silver
Zinc (total)

In addition, the permittee shall monitor any new toxic substances as defined by the FWPCA following notification by the Illinois Environmental Protection Agency.

B. As receiving waters are designated as Secondary Contact and Indigenous Aquatic Life Waters, as per PART III, Illinois Pollution Control Board Rules and Regulations, Chapter 3, the waters shall meet the following standards:

Temperature shall not exceed 93° F (34° C) more than 5% of the time, or 100° F (37.8° C) at any time.

4. The discharge credit, if necessary, for contaminated storm water from storage lagoons and process area storm water runoff, as applies to discharge #001, shall be as follows:

Additional storm water credit for the following parameters shall be based on quantity of storm flow taken through process treatment.

---

* Sample shall be a grab sample.

ATTACHMENT G CONTINUED

Parameter	Pounds Per 1000 gallons of storm water flow * Average	Maximum
BOD_5	.21	.4
T. Suspended Solids	.17	.26
COD	1.6	3.1
Oil and Grease	.067	.126

Dry Weather Flow: The average flow from the wastewater treatment facility for the last three consecutive zero precipitation days. Previously collected storm water which is sent to process treatment during this period shall not be included in this computation.

*Storm Water Flows: The storm water runoff which is treated in the wastewater treatment facility, that portion of flow greater than the dry weather flow. Measurement of contaminated storm water from tank dike areas and previously collected may also be used in computing storm water credit.

The storm water credit does not allow the permittee to exceed the concentration limits, nor to receive pound credit for uncontaminated storm water to process from storage lagoons.

In computing monthly average permit limits to include storm water credit, the pound credit calculated above shall be averaged along with process pound limits over the 30 day period. Explanatory calculations and flow data shall be submitted together with Discharge Monitoring Reports.

5. Mathematical composites for oil, fats and greases shall consist of a series of flow proportion weighted grab samples collected over any 24-hour consecutive period. Each sample shall be analyzed separately and the weighted average reported. No single grab sample shall contain more than 75 mg/1 concentration. (A mathematical composite consists of the average of all grab samples collected and analyzed during a 24-hour period.)

ATTACHMENT G CONTINUED

6. By Order of the Pollution Control Board (PCB 80-53), Mobil Oil Corporation has been granted a variance from Chapter 3, Rules 408(a) and 1002 of the Board's Rules and Regulations as they relate to cyanide for Mobil's petroleum refinery in Will County, Illinois, until December 31, 1981.

   Under the terms of that variance, the Permittee shall be allowed to discharge cyanide, subject to the following conditions, until June 30, 1981.

   a. Mobil's effluent cyanide concentration shall be limited to a monthly average of 0.2 mg/l and a daily maximum of 0.37 mg/l, except: one excursion per month above the 0.37 mg/l daily maximum shall be allowed up to an absolute limit of 1.5 mg/l.

   b. Mobil shall continue to submit progress reports to the Agency as reported by previous variances for this facility.

   c. Mobil is allowed to use sulfamic acid in testing for cyanide levels.

7. Permittee shall be allowed to discharge cyanide, not to exceed the following, until June 30, 1981.

Concentration Limits mg/l		Load Limits lbs./day (Kg/day)	
30 Day Average	Daily Maximum	30 Day Average	Daily Maximum
0.2	0.37 *	5.99 (2.72)	12.66 (5.74)

* See Special Condition 6a on page 15.

ATTACHMENT H

Standard Conditions

Act means the Illinois Environmental Protection Act, Ch. 111 1/2 *Ill. Rev. Stat.*, Sec. 1001-1051 as Amended.

Agency means the Illinois Environmental Protection Agency.

Board means the Illinois Pollution Control Board.

Chapter 3 means the Illinois Pollution Control Board Rules and Regulations, Chapter 3: Water Pollution.

Daily maximum means the maximum unit magnitude discharged during any calendar day.

Director means the Director of the Illinois Environmental Protection Agency.

FWPCA means the Federal Water Pollution Control Act, as amended, 33 U.S.C. 466 et seq., Public Law 95-217, approved December 27, 1977 (commonly referred to as the Clean Water Act).

NPDES means the National Pollutant Discharge Elimination System.

Weekly average means the arithmetic mean of samples collected during a period of seven consecutive calendar days for the purposes of monitoring and reporting.

Monthly average means the arithmetic mean of samples collected during a calendar month for purposes of monitoring and reporting. Alternatively, monthly average may be construed by the Illinois Environmental Protection Agency to be defined as the arithmetic means of samples collected during any period of 30 consecutive calendar days.

1. All discharges authorized herein shall be consistent with the terms and conditions of this permit. The discharge of any pollutant identified in the permit in excess of that authorized shall constitute a violation of the permit. Any anticipated facility expansions, production increases, or process modifications which will result in new, different, or increased discharges of pollutants must be reported by submission of a new NPDES application or, if such discharges will not violate the effluent limitations specified in this permit, by notice to the Agency of such changes. Following such notice, the permit may be revised to specify and limit any pollutants not previously limited.

2. In case of conflict between these standard conditions and any special conditions attached to this permit, the special conditions shall govern.

3. Except as otherwise provided in the Permit, all waters of the State shall be kept free from unnatural sludge or bottom deposits, floating solids, visible oil, odor, unnatural plant or algae growth, unnatural color or turbidity, visible foam or matter in concentrations or combinations toxic or harmful to human, animal, plant or aquatic life of other than natural origin.

4. Pursuant to Chapter 3, this permit may be modified, suspended or revoked in whole or in part during its term for cause including, but not limited to, the following:

   a. Violation of any terms or conditions of the permit (including, but not limited to, schedules of compliance and conditions concerning monitoring, entry, and inspection);

   b. Obtaining a permit by misrepresentation or a failure to disclose fully all relevant facts; or,

c. A change in any circumstance that mandates either a temporary or permanent reduction of elimination of the permitted discharge.

5. This permit may not be assigned or transferred. In the event of any change in control or ownership of facilities from which the authorized discharges emanate, the permittee shall notify the succeeding owner or controller of the existence of this permit by letter, a copy of which shall be forwarded to the Agency.

6. The issuance of this permit does not convey any property rights in either real or personal property, or any exclusive privileges, nor does it authorize any injury to private property or any invasion of personal rights, nor any infringement of federal, state or local laws or regulations.

7. The permittee shall allow any agent duly authorized by the Agency and/or the United States Environmental Protection Agency upon the presentation of credentials:

   a. To enter the permittee's premises where effluent sources are located or in which any records are required to be kept under the terms and conditions of this permit.

   b. To have access to and copy at reasonable times any records required to be kept under the terms and conditions of this permit.

   c. To inspect at reasonable times any monitoring equipment or monitoring method required to be kept by this permit.

   d. To sample at reasonable times any discharge of pollutants.

8. Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penal-

ties to which the permittee is or may be subject under Section 311 of the FWPCA and shall not be construed to relieve the permittee from civil or criminal penalties for noncompliance.

9. Nothing in this permit shall be construed to preclude the institution of any legal action nor relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable state law or regulation under authority preserved by Section 510 of the FWPCA.

10. Any owner of any publicly owned or regulated treatment works shall give notice to the Agency of the following:

    a. Any new introduction of pollutants into such treatment works from a source which would be a new source as defined in Section 306 of the FWPCA if such source were discharging pollutants directly to the waters of the State;

    b. Except as to such categories and classes of point sources or discharges which may be specified by the Agency, any new introduction of pollutants into such treatment works from sources which would be a point source subject to Section 301 of the FWPCA if it were discharging such pollutants directly to the waters of the State;

    c. Any substantial change in volume or character of pollutants being introduced into such treatment works by a source introducing pollutants into such works at the time of issuance of the permit; and

    Such notices shall contain information on:

    The quality and quantity of wastewater to be introduced into such treatment works, and

    Any anticipated impact of such change in the quantity or quality of effluent to be discharged

from such publicly owned or publicly regulated treatment works.

11. If a toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is established pursuant to Section 307(a) of the FWPCA for a toxic pollutant which is present in the discharge authorized herein and such standard or prohibition is more stringent than any limitation upon such pollutant in this permit, this permit shall be revised by the Agency in accordance with the toxic effluent standard or prohibition and the permittee shall be so notified.

12. If for any reason the permittee does not comply with or will be unable to comply with any parameter limitation or other condition as specified in this permit, or should any unusual or extraordinary discharge of waste occur from the facilities herein permitted, the permittee shall provide the Agency with the following information in writing within *five (5)* days of becoming aware of the condition:

    a. A description of the non-complying discharge including the impact upon the receiving water.

    b. Cause of non-compliance.

    c. Anticipated time the condition of non-complying is expected to continue, or if such condition has been corrected, the duration of the period of non-compliance.

    d. Steps to be taken by the permittee to prevent recurrence of the condition of non-compliance.

    e. Steps taken by the permittee to reduce and eliminate non-compliance.

13. The diversion or bypass of any discharge from the treatment works by the permittee is prohibited, except: (1) where unavoidable to prevent the loss of

life or severe property damage; or, (2) where excessive storm drainage runoff would damage any facilities necessary for compliance with the terms and conditions of this permit. The permittee shall notify the Agency within 72 hours of each diversion or bypass in accordance with the procedure specified in Standard Condition 12 for reporting non-compliance. The permittee shall within 30 days after such incident submit for approval a plan to prevent recurrence of such incidents.

14. The permittee shall take all reasonable steps to minimize any adverse impact on waters of the State resulting from non-compliance with any effluent limitations specified in this permit. The permittee will also provide accelerated or additional monitoring as necessary to determine the nature and the impact of the non-complying discharge(s).

15. The permittee is responsible for maintaining adequate safeguards to prevent the discharge of untreated or inadequately treated wastes during electrical power failures either by means of alternate power sources, standby generators or retention of inadequately treated effluent. Should the treatment works not include the above capabilities at the time of permit issuance, the permittee must furnish within 120 days to the Agency, for approval, plans for such facilities and an implementation schedule for their installation.

16. The permittee shall effectively monitor the operation and efficiency of all treatment and control facilities and the quantity and quality of the treated discharge. The permittee must obtain the equipment necessary to perform the tests designated by the influent and effluent limitations indicated in Schedule B, and A if included, or be able to utilize other laboratory services to determine and report the necessary results. Samples and measurement taken as

required herein shall be representative of the volume and nature of the monitored discharge. Monitoring data required for this permit shall be summarized on a calendar month basis. Individual reports for each reporting period are to be submitted on the basis indicated in Schedule B and A if included of this permit, and/or on the appropriate forms as indicated by the Agency. Original copies of the Discharge Monitoring Report form properly signed and completed must be submitted and postmarked within fifteen (15) days after the end of the reporting period to: Illinois EPA, DWPC, 2200 Churchill Road, Springfield, Illinois, 62706, Attention: NPDES Unit (DMR).

17. The permittee shall record for all samples the date and time of sampling, the sampling method used, the date that analyses were performed, the identity of the analyses, and the results of all required analysis and measurements. All sampling and analytical records required by this permit shall be retained for a minimum of three years. The permittee shall also retain all original records from any continuous monitoring instrumentation and any calibration and maintenance records for a minimum of three years. The periods will be extended on a day-for-day basis during the course of any unresolved litigation, or when so requested by the Agency.

    If the permittee monitors any pollutant at the location(s) designated herein more frequently than required by this permit, using approved analytical methods as specified above, the results of such monitoring shall be included in the calculation and reporting of the values required in the Discharge Monitoring Report Form. Such increased frequency shall also be indicated.

18. The analytical and sampling methods used shall conform to 40 CFR Part 136 which includes *selected*

methods from current editions of the reference manuals listed below:

a. "Standard Methods for the Examination of Water and Wastewaters", APHA, Washington, D.C.

b. "A.S.T.M. Standards, Part 31, Water"; American Society for Testing and Materials, Philadelphia, Pennsylvania.

c. "Methods for Chemical Analysis of Water and Waste", EPA, Technology Transfer.

The permittee shall calibrate and perform maintenance procedure on all monitoring and analytical instrumentation at intervals to ensure accuracy of measurements.

19. Except for data determined to be confidential pursuant to Section 7 or 7.1 of the Act or Section 308 or the FWPCA, all monitoring reports recorded by this permit shall be available for public inspection at the offices of the Agency. Knowingly making any false statement on any such report may result in the implementation of criminal penalties as provided for in Section 309 of the FWPCA and Section 44 of the Act.

20. The permittee shall at all times maintain in good working order and operate as efficiently as possible any facilities or systems of control installed by the permittee to achieve compliance with the terms and conditions of the permit.

21. Owners of publicly owned or publicly regulated treatment works shall require that any industrial user of such treatment works comply with federal requirements concerning:

a. User charges and recovery of construction costs pursuant to Section 204(b) of the FWPCA, and applicable regulation in 40 CFR 35;

b. Toxic pollutant effluent standards and pretreatment standards pursuant to Section 307 of the FWPCA;

c. Inspection, monitoring and entry pursuant to Section 308 of the FWPCA.

22. Collected screenings, slurries, sludges, and other solids shall be disposed of in such a manner as to prevent entry of those wastes (or runoff from the wastes) into waters of the State. The proper authorization for such disposal shall be obtained from the Agency and is incorporated as part hereof by reference.

23. If any interim effluent limitations and/or schedule of compliance is provided for in this permit pursuant to Rule 409 of Chapter 3, the permittee is required to take such action to bring the discharge into compliance within the shortest period of time possible. If the Agency determines that the permittee is not taking timely action to secure the appropriate grant funding, the Agency may take the following actions:

a. Place the permittee on restricted status.

b. Initiate appropriate enforcement action.

24. The discharge(s) authorized by this permit shall comply with, in addition to the requirements of the permit, all applicable provisions of Chapter 3 or applicable orders of the Board which are consistent with the FWPCA or regulation adopted thereunder.

25. The permittee shall not commence construction or modification of any treatment works, disposal well, wastewater source, or process modification until an authorization to construct has been issued pursuant to Rule 910 of Chapter 3. If an authorization to construct is issued, it is hereby incorporated as a condition of this permit.

26. The permittee is not authorized to discharge after the expiration date. In order to receive authorization to discharge beyond the expiration date, the permittee shall submit the proper application as required by the Agency not later than 180 days prior to the expiration date.

27. "This permit may be modified or revised, or, alternatively revoked and reissued, to comply with an applicable effluent limitation issued pursuant to the order of the United States District Court for the District of Columbia issued on June 8, 1976, in *Natural Resources Defense Council, Inc., et al.* v. *Russell E. Train*, 8 ERC 2120 (D.D.C. 1976), if the effluent limitation so issued:

    (1) is different in conditions or more stringent than any effluent limitation in the permit; or

    (2) controls any pollutant not limited to the permit."

    This permit may be revised, following notice by the Agency that applicable effluent limitation covered by the Natural Resources Defense Council, Inc. et al. v. Train, 8 E.R.C. 2120 (D.D.C. 1976) will not be promulgated, to incorporate any applicable effluent limitation determined under Section 402(a)(1) of the Federal Water Pollution Control Act. (FWPCA) Amendments of 1972 as necessary to carry out the provisions of Section 301(b)(2)(a) of the FWPCA, if the effluent limitation so determined;

    a. Is more stringent than any effluent limitation in the permit; or

    b. Controls any pollutant not limited in the permit.

28. This permit may be revised to incorporate, if necessary, applicable provisions of an approved 208 plan pursuant to Section 208 of the FWPCA.

29. Applicable new or amended Pollution Control Board Rules or Regulations. Regulations promulgated pur-

suant to the FWPCA or Amendments to the FWPCA shall be incorporated herein and become part hereof when the Rule, Regulation or Amendment becomes effective. The Agency will notify each affected NPDES permittee of such incorporation.

30. The provisions of this permit are severable, and if any provision of this permit or the application of any provision of this permit to any circumstance is held invalid, the application of such provision to other circumstances and the remainder of this permit shall not be affected thereby.

JG/bs/4621/1-8
(Rev. 9/19/78)

Illinois Environmental Protection Agency
2200 Churchill Road, Springfield, IL 62706

217/782-9720

Mobil Oil Corporation
Joliet Refinery
NPDES Permit No. IL0002861
Report of Compliance Sampling Inspection

Oct. 8, 1982

Mobil Oil Corporation
I-55 and Arsenal Road
Joliet, Illinois 60434

Gentlemen:

On April 28-29, 1982 a Compliance Sampling Inspection was completed by personnel from the Agency's Maywood Regional Office. The purpose of this letter is to give notification of the results of the inspection. It has been reported that at the time of the inspection, this facility was in compliance with all NPDES regulations and that proper operation and maintenance was being given to the facility.

The Agency hopes that this excellent effort will continue. Should you need assistance from the Agency, please contact Judy Meyer at 217/782-9720.

Very truly yours,

/s/ Robert E. Broms, P.E.
ROBERT E. BROMS, P.E.
Manager, Compliance Assurance Section
Division of Water Pollution Control

REB:JM:rd5477C/1

cc: USEPA, Enforcement Division
Compliance Assurance Section
Records Unit
Region 2
J. Meyer

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 82M368

IN THE MATTER OF:

MOBIL OIL COMPANY
CHANNAHON, ILLINOIS

APPLICATION FOR ADMINISTRATIVE WARRANT

NOW COMES the Administrator of the United States Environmental Protection Agency (U.S. EPA), by and through Dan K. Webb, United States Attorney for the Northern District of Illinois and applies for an administrative warrant to enter, inspect and photograph the premises and to take samples of sludge and liquid influents and effluents at the Mobil Oil Company facility, Arsenal Road, Channahon, Illinois on three separate days within a ten day period in accordance with Section 308 of the Clean Water Act, 33 U.S.C. 1318. In support of this application, the Administrator respectfully submits two affidavits and a proposed warrant.

Respectfully submitted

DAN K. WEBB
United States Attorney

By: /s/ Edward Johnson
Assistant United
States Attorney
219 South Dearborn St.
Chicago, Illinois 60604
353-5312

This 27th day of Aug. 1982

/s/ Carl B. Sussman

U.S. Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

82M368

IN THE MATTER OF:

MOBIL OIL COMPANY,
CHANNAHON, ILLINOIS

AFFIDAVIT IN SUPPORT OF APPLICATION
FOR WARRANT TO ENTER, INSPECT,
PHOTOGRAPH, AND SAMPLE PURSUANT
TO THE CLEAN WATER ACT

AFFIDAVIT OF JONATHAN BARNEY

JONATHAN BARNEY, being first duly sworn, states as follows:

1. I am currently employed as a Chemical Engineer in the Permit Section, Water Quality Branch, Water Division, Region V, United States Environmental Protection Agency, (U.S. EPA). In my capacity as a chemical engineer in the Permit Section, I serve as a regional expert in the areas of chemical engineering and environmental chemistry related to water pollution control. My responsibilities include providing technical assistance to federal and state National Pollution Discharge Elimination System (NPDES) permit staffs within the Region, in the development and review of discharge limitations and monitoring requirements for toxic pollutants. One of my specific duties is to recommend industrial and municipal facilities for extended compliance sampling inspections for toxicants (known as CSI-Ts) to be conducted by our Environmental Services Division.

2. The purpose of the CSI-Ts is twofold: to check for compliance with existing effluent limitations and other permit requirements, and to determine whether additional toxic pollutants are being discharged that should be lim-

ited or otherwise addressed in the next permits. Samples of wastewater, and often sludge, are collected and analyzed for a wide range of chemicals using broad scan techniques as well as specifically for any substances known or suspected to be present based on past experience and evaluation of the facilities products and processes. Bioassays also are performed to test for harmful effects to fish, Daphnia, and bacteria. In order to achieve the objectives of the survey at a complex plant that manufactures or uses chemicals, samples often must be collected from selected process waste streams within the plant as well as the final effluent after treatment. There are a number of reasons for collecting and analyzing in-plant waste streams:

A. Many toxic pollutants are of concern even at relatively low levels. Analysis of combined waste streams can be hampered by dilution with uncontaminated cooling water and other process wastes as well as by interferences introduced by pollutants in other process wastes. Since this is a one-time sampling, it is desirable to achieve the greatest possible analytical sensitivity; pollutant concentrations can vary widely over periods of days, weeks, or months, depending upon production schedules and other factors.

B. In order to evaluate existing treatment and allow consideration of potential additional treatment in the next permit, some indication of a pollutant's source (at least general process area) and raw waste load is needed.

C. The influent to the main treatment system often is sampled to allow evaluation of treatment efficiency of the combined waste.

D. Treatment system sludges often are sampled to obtain a time-integrated picture of those pollutants that concentrate in the solids.

3. The Mobil Oil Company facility at Channahon was selected for a CSI-T as part of an ongoing administrative program to monitor facilities that have some potential for the discharge of toxic pollutants. In addition, the inspection was scheduled pursuant to the continuing U.S. EPA program to monitor compliance with existing NPDES permit requirements. I selected the areas to be sampled based upon my knowledge of the facility's processes and my knowledge of pollutant sources at similar facilities. In order to accomplish the objectives of the CSI-T, as described above, the following wastestreams must be sampled, in addition to the final effluent:

A. Combined effluent from the east and west clarifiers of the activated sludge treatment system.

B. Influent to the east and west aeration basins of the activated sludge treatment system (combined raw waste following east equalization basin).

C. Waste activated sludge from "Tank 580" or equivalent (prior to heat treatment).

Except for the sludge all samples are to be 24 hour composites collected using either automatic sample equipment or a series of manual grabs, at the discretion of the survey team. Analyses of these samples is necessary to enable the U.S. EPA accurately assess compliance and develop any necessary new permit limits for this Mobil Oil facility.

Further affiant sayeth not.

/s/ Jonathan Barney
JONATHAN BARNEY
Chemical Engineer
U.S. EPA, Region V

Subscribed to and sworn before me
this 27th day of August, 1982

/s/ [Illegible]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

82M368

IN THE MATTER OF:

MOBIL OIL COMPANY
CHANNAHON, ILLINOIS

AFFIDAVIT IN SUPPORT OF APPLICATION FOR WARRANT TO ENTER, INSPECT, PHOTOGRAPH, AND SAMPLE PURSUANT TO THE CLEAN WATER ACT

AFFIDAVIT OF BASIM J. DIHU

BASIM J. DIHU, being first duly sworn, states as follows:

1. I am currently employed as an environmental engineer by the Environmental Services Division, Central District Office of the United States Environmental Protection Agency (U.S. EPA), Region V. In my capacity as an environmental engineer, I am responsible for conducting field investigations or inspections to determine compliance with air, water, and hazardous waste requirements. Specifically, I conduct compliance monitoring inspections of water pollution control facilities at municipal and industrial sites and water quality investigations which include Fate/Risk studies, dilution studies and detailed ambient water quality studies. Most of these inspections include the collection of samples for analysis.

2. On April 28, 1982, I visited the Mobil Oil Company facility in Channahon, Illinois to conduct an inspection pursuant to the Clean Water Act as requested by the U.S. EPA, Region V, Permit Section. Upon arrival at the Mobil Oil facility, I presented my credentials and requested the following from Mr. Charles Clodi, Manager of the Technical Department;

1. A twenty-four hour composite on
   a) Discharge from 001—treated process
   b) Discharge 002—non-contact cooling water
   c) Storm water discharge.

Mr. Clodi permitted me to collect each of these samples. I also requested to be permitted to sample the following:

1. Grab samples before aeration basin
2. Grab samples before the treated water guard basin
3. Sludge samples before heat treatment.

Mr. Clodi communicated with the headquarters of the Mobil Oil Company and then told me. I would not be permitted to collect these additional samples. I contacted the U.S. EPA, Region V office which then spoke with counsel for the Mobil Oil Company. An agreement could not be reached, so I discontinued the inspection.

Further affiant sayeth not.

/s/ Basim J. Dihu
BASIM J. DIHU
Environmental Engineer
U.S. EPA, Region V

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

82M368

IN THE MATTER OF:

MOBIL OIL COMPANY
CHANNAHON, ILLINOIS

Civil Inspection Warrant to Enter,
Inspect, Photograph and Sample
Pursuant to 33 U.S.C. § 1318

TO: Basim J. Dihu, Illinois/Indiana Field Investigation Section, Environmental Services Division, Central District Office, a duly authorized representative of the Administratrix of the United States Environmental Protection Agency, and any other duly authorized representative of the Administratrix of the United States Environmental Protection Agency.

An application having been made by the United States Attorney on behalf of the United States Environmental Protection Agency (U.S. EPA) for a warrant of entry, inspection, photography and sampling to determine compliance with National Pollution Discharge Elimination System (NPDES) permit limits and to assist in the developing of effluent limitations, and affidavits having been executed by Basim J. Dihu and Jonathan Barney, both employees of the United States Environmental Protection Agency, that each believes that an inspection and sampling at the described property are necessary for the above mentioned purposes;

And, the court being satisfied that there has been sufficient showing that reasonable legislative or administrative standards for conducting an inspection and investigation have been satisfied with respect to the said described premises;

IT IS HEREBY ORDERED THAT U.S. EPA through its duly authorized representative, Basim J. Dihu and other duly authorized representatives of the U.S. EPA are hereby entitled to and shall be authorized and permitted to have entry upon the following described property for a total of three separate inspections within the ten (10) day period for which this warrant is effective, which is located in the Northern District of Illinois those premises known as;

> the Mobil Oil Company facility located at Interstate 55 and Arsenal Road in Channahon, Illinois, (mailing address P.O. Box 874, Joliet Illinois, 60634)

IT IS FURTHER ORDERED that the entry, inspection, photographing and sampling, authorized herein shall be conducted during regular working hours or at other reasonable times, within reasonable limits and in a reasonable manner from 6:00 a.m. to 10:00 p.m.

IT IS FURTHER ORDERED that the warrant issued herein shall be for the purpose of conducting an entry, inspection, photographing and sampling pursuant to 33 U.S.C. § 1318 consisting of the following:

1. Entry to, upon or through the above described premises including all buildings, structures, equipment, machines, devices, materials and sites to inspect, sample, monitor and investigate the said premises.
2. Sample and seize combined effluent from the east and west clarifiers of the activated sludge treatment system.
3. Sample and seize sludge prior to the heat treatment system.
4. Sample and seize influent to the east and west aeration basins of the activiated sludge treatment system (combined raw waste following east equalization basin)

5. Sample and seize any and all final effluent (s)
6. Take such photographs of the above authorized procedures as they may be required or necessary.

IT IS FURTHER ORDERED that a copy of this warrant shall be left at the premises at the time of inspection.

IT IS FURTHER ORDERED that if any property is seized, the authorized representative or representatives conducting the search and seizure shall leave a receipt for the property taken and prepare a written inventory of the property seized and return this warrant with the written inventory before me within 10 days from the date of this warrant.

IT IS FURTHER ORDERED that the warrant authorized herein shall be valid for a period of 10 days from the date of this warrant.

IT IS FURTHER ORDERED that the United States Marshal is hereby authorized and directed to assist the representatives of the United States Environmental Protection Agency in such manner as may be reasonable, necessary and required.

Dated: August 27, 1982

/s/ Carl B. Sussman
CARL B. SUSSMAN
United States Magistrate

September 15, 1983

Mobil Oil 308 Decision

Dale S. Bryson
Deputy Director, Water Division

ORIGINAL SIGNED BY
DALE S. BRYSON

Martha Prothro, Director
Permits Division (EH-336)

Attached is a copy of the Seventh Circuit Court of Appeals decision on the Mobil Oil Section 308 case. It is a clear victory for USEPA. Very briefly USEPA requested Mobil's permission to collect samples of internal waste streams as well as the treatment plant effluent. Mobil granted the latter but refused the former. We obtained a warrant and collected the internal waste stream samples. Mobil motioned to quash the warrant and when that failed, they filed an action in the district court for a permanent injunction prohibiting additional sampling and asking for the return of the samples already taken. The district court dismissed the suit with prejudice. Mobil appealed.

The September 14 decision by the Court of Appeals makes it very clear that we have very broad authority under Section 308. In addition to some other interesting observations, the Court states, "Thus Section 308(a) also expressly authorizes the EPA to collect samples whenever required to develop new permit limits on the discharge of pollutants. These provisions of Section 308(a) leave no doubt that the Congress that enacted that Section was firmly convinced that the interest of permit holders such as Mobil in keeping secret information about these pollutants in its waste water is not entitled to protection."

This decision should help in the permit writing effort.

Attachment

cc Regional Water Division Directors w/attachment

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Washington, D.C. 20460

Jun. 29, 1978

Office of
General Counsel

MEMORANDUM

SUBJECT: Effect of Supreme Court Decision in *Marshall v. Barlow's, Inc.*, on EPA Information-Gathering and Inspection Activities

FROM: General Counsel /s/ Isaac Z. Bernstein

TO: Assistant Administrator for Enforcement
Assistant Administrator for Water and Hazardous Materials
Assistant Administrator for Air and Waste Management
Assistant Administrator for Toxic Substances
Regional Administrators, Regions I-X

As you are probably aware, on May 23, 1978, the Supreme Court decided the case of *Marshall v. Barlow's, Inc.*,[1] holding unconstitutional warrantless administrative searches or inspections by OSHA under the Occupational Safety and Health Act of 1970. The purpose of this memorandum is to discuss the applicability of the Court's decision to the information-gathering and inspection activities conducted by EPA under our various authorizing statutes, and to recommend administrative responses and procedures to minimize the disruptive impact of the decision on those activities.

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[1] —— U.S. —— (No. 76-1143); 46 U.S.L.W. 4483.

A. *Applicability of the Decision to EPA Activities*

1. *Synopsis of Barlow's Decision*

The major relevant holding of the *Barlow's* opinion is a reaffirmation of the principle, established in earlier cases,[2] that administrative agencies ordinarily must obtain search warrants to enter private property for regulatory purposes, unless the property owner consents to the entry. The Court's opinion indicates that exceptions to the warrant requirement will be found very rarely—only in the case of certain pervasively regulated industries with a tradition of close government supervision, or perhaps where the imposition of a warrant requirement would substantially impair the regulatory scheme. Apart from these situations,[3] the Court held, warrantless entries are inconsistent with the Fourth Amendment and will be enjoined.[4]

The Court's opinion does not, however, imply that every statute purporting to allow a right of warrantless entry will automatically be voided or held unconstitutional. The opinion suggests instead that where the statutory provision is implemented and applied in such a way that an agency must procure a warrant or its functional equivalent (*i.e.*, an injunction) where consent to enter is refused, and where that refusal does not invoke the possibility of sanctions, the right of entry will be upheld.

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[2] *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967).

[3] The Court has so far recognized only liquor and firearms regulation as qualifying for this exception.

[4] *Barlow's* does not alter the "exigent circumstances" exception to the warrant requirement. This exception would permit EPA to conduct warrantless nonconsensual entries under its statutes where prompt inspections are required as a result of emergency situations. *State of Michigan v. Tyler*, —— U.S. —— (No. 76-1608; May 31, 1978), 46 U.S.L.W. 4533; *Camara v. Municipal Court*, *supra* at 539.

The Court in *Barlow's* also clarified the showing that must be made to a judicial officer to justify the issuance of a warrant for an administrative inspection. An agency need not show that there is probable cause, in the strict criminal sense, to believe a violation of law will be discovered. Instead, the agency may show either that it has specific evidence of an existing violation of regulatory requirements, or that the decision to enter is based on a reasonable, general neutral (*i.e.*, non-discriminatory) plan for the implementation [5] or enforcement of the regulatory scheme. The showing now required thus appears to be of a minimal nature, and warrants should be easily obtained by EPA.[6]

2. *Warrant Requirements for EPA Activities*

On the basis of an analysis of each of the Agency's authorizing statutes,[7] I have concluded (a) that each of those statutes could be held subject to the warrant requirement,[8] and (b) that each of those statutes can be

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[5] While *Barlow's* does not specifically discuss entries to gather information for standard-setting, the rationale of the opinion appears to apply in the same fashion in that context as where the entry is to enforce existing standards.

[6] Once an investigation becomes primarily directed at possible criminal prosecution, or if the entry is to gather evidence for a criminal prosecution, a search warrant must be obtained under Rule 41 of the Federal Rules of Criminal Procedure; this warrant may be issued only under the traditional probable cause standard. See, *State of Michigan v. Tyler*, *supra*, 46 U.S.L.W. at 4537; *cf.*, *U.S. v. LaSalle National Bank*, —— U.S. —— (No. 77-365; June 19, 1978), 46 U.S.L.W. 4713.

[7] This memorandum does not address the statutory interpretation question of whether each of the statutes does in fact contain a right of entry.

[8] It could be argued that those of the Agency's statutes that can be characterized as regulating a particular industry (*i.e.*, the Federal Insecticide, Fungicide, and Rodenticide Act, the Safe Drinking Water Act, the Toxic Substances Control Act, and Title II of the Clean Air Act) may be eligible for exceptions to the warrant re-

applied in a way that is consistent with the requirements articulated in the Court's opinion. While the requirement does apply to both information-gathering and compliance determination activities under our various statutes, warrants need be obtained only when consent to enter is refused by the party involved.

B. *Recommended Actions and Procedures*

1. *New Regulations Needed*

The Supreme Court's opinion indicates that right of entry provisions will be upheld where the agency is legally committed to obtaining judicial authorization for entry when consent is refused and where that refusal does not trigger a threat of sanctions. I therefore recommend that each headquarters program and enforcement office exercising or authorizing the exercise of rights of entry under the Clean Air Act, Noise Control Act, Clean Water Act, Safe Drinking Water Act, Resource Conservation and Recovery Act, Toxic Substances Control Act, or Federal Insecticide, Fungicide, and Rodenticide Act immediately draft, in consultation with the Office of General Counsel, regulations governing EPA entry procedures under each of those laws.

These regulations should require EPA officials to seek warrants or injunctions where consent is refused,[9] and

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quirement as pervasively regulating those industries. Based both on my analysis of the probability of success of such arguments and the virtual certainty that protracted litigation would result from their use, I believe that for the present EPA should not base inspections under those statutes on the possibility of such exceptions. If at some later time we find that the burden of obtaining warrants where consent is refused has begun to significantly undermine our enforcement efforts, we will then be in a much better position to litigate over possible exceptions, as noted in point B. 4. below.

[9] Where the desired entry is for standard-setting purposes, practical considerations may make it advantageous to obtain injunctions rather than warrants.

should have the effect of precluding the imposition of sanctions for any such refusal.[10] Depending on the importance of surprise inspections to the enforcement of the particular statute involved, the regulations may also authorize EPA officials to seek warrants without attempting to gain consent.

2. *Immediate Procedural Steps*

Since the *Barlow's* decision has received wide publicity, we can expect a brief initial period during which litigation may result immediately from any failure by EPA to carefully adhere to what is now apparently the law. In order to avoid adverse decisions and disruptive challenges to our ongoing activities, I recommend that all EPA staff conducting entry-related activity be immediately instructed: (a) Not to cite any EPA statute as authorizing a right of warrantless entry; (b) Not to refer to or in any way threaten the possible imposition of any civil or criminal sanctions or penalties in connection with any desired entry or refusal to consent to entry; (c) Not to attempt to enforce any right of entry through the issuance or the threat of issuance of any administrative order, the violation of which could result in the imposition of civil or criminal sanctions or penalties; and (d) To gain entry where consent is refused [11] either by obtaining warrants or by seeking injunctive orders from district courts, where that is authorized by the statute involved.[12] For the next

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[10] While FIFRA does contain explicit authorization to seek warrants [§ 9(b)], regulations are still needed to require EPA to do so when consent is refused, thus precluding the argument that refusal of consent can result in the imposition of sanctions.

[11] As noted above, warrants may often be sought without first seeking consent.

[12] The legal authority under which magistrates issue administrative search warrants of a noncriminal nature, in the absence of a specific statutory authorization to do so [see *e.g.*, FIFRA § 9(b)], is not clear. At least one circuit court however has held that such warrants may be obtained where there is a statutory right of entry,

several months, I also request that regional offices consult with the appropriate headquarters office when entry has been refused, in order to implement these steps in a nationally consistent fashion.

3. *Simplification of Warrant or Order Process*

The Court's clarification of the showing required to obtain an administrative inspection warrant enables Agency offices to prepare standard documents to be used by each office in applying for warrants. These documents should include full descriptions of the program involved and the general plan and criteria under which particular establishments are selected for inspection or entry. Legal briefs in support of the applications for the warrants should also be prepared for use if needed, as will sometimes be the case, in connection with a particular application. The Office of General Counsel will assist in the development of these papers. All standard form letters for requesting entry now in use should also be examined at once to determine whether they are consistent with the criteria stated in point 2 above.

I also recommend that arrangements be made with the Justice Department to enable us to obtain warrants ex-

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Midwest Growers Co-op. Corp. v. Kirkemo, 533 F.2d 455, 462 (9th Cir., 1976), and it appears likely that *Barlow's* will be read to authorize the issuance of warrants where a statutory right of entry exists. See, *e.g.*, *Empire Steel Mfg. Co. v. Marshall*, 437 F.Supp. 873, 881-882 (D. Mont., 1977).

It is also possible that the *Barlow's* opinion will be read to suggest that where a statute contains a provision authorizing an agency to commence a civil action for injunctive relief to gain entry, the agency must follow that course rather than seeking a warrant. While that is a possible interpretation of the Court's language, slip op. at 13-14, I do not believe the Court intended to mandate such a reading. I therefore recommend that EPA interpret the case as permitting the Agency to either seek a warrant or commence a civil action (where authorized), whichever is more appropriate under the circumstances.

peditiously. These arrangements should be made by the Office of Enforcement for all EPA enforcement programs and by the Office of General Counsel for all EPA programs exercising rights of entry for other information-gathering purposes.

4. *Other Actions*

Finally, the Court's opinion suggests that if the burdens of obtaining warrants seriously undermines the successful implementation of a regulatory scheme, that scheme may qualify as an exception to the warrant requirement. I also recommend therefore that all offices obtaining warrants for entries keep reasonable written records of the incremental burden involved and any other serious drawbacks to the warrant requirements in practice. As noted above, if we can amass sufficient evidence of the importance of a right of warrantless entry, Congress and the Supreme Court may be persuaded that the program involved is appropriately excepted from the warrant requirement.

cc: The Administrator
The Deputy Administrator
Associate General Counsels
Regional Counsels
Regional Division Directors

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

11 Apr 1979

MEMORANDUM Office of Enforcement

TO: Regional Administrators
Surveillance and Analysis Division Directors
Enforcement Division Directors

FROM: Assistant Administrator
for Enforcement

SUBJECT: Conduct of Inspections After the *Barlow's* Decision

I. *Summary*

This document is intended to provide guidance to the Regions in the conduct of inspections in light of the recent Supreme Court decision in *Marshall v. Barlow's, Inc.*, —— U.S. ——, 98 S. Ct. 1816 (1978). The decision bears upon the need to obtain warrants or other process for inspections pursuant to EPA-administered Acts.

In *Barlow's*, the Supreme Court held that an OSHA inspector was not entitled to enter the non-public portions of a work site without either (1) the owner's consent, or (2) a warrant. The decision protects the owner against any penalty or other punishment for insisting upon a warrant.

In summary, *Barlow's* should only have a limited effect on EPA enforcement inspections:

- Inspections will generally continue as usual;
- Where an inspector is refused entry, EPA will seek a warrant through the U.S. Attorney;
- Sanctions will not be imposed upon owners of establishments who insist on a warrant before

allowing inspections of the non-public portions of an establishment.

The scope of the *Barlow's* decision is broad. It affects all current inspection programs of EPA, including inspections conducted by State personnel and by contractors. The Agency's procedures for inspections, particularly where entry is denied, were largely in accord with the provisions of *Barlow's* before the Supreme Court issued its ruling. Nevertheless, a number of changes in Agency procedure are warranted. Thus, it is important that all personnel involved in the inspection process be familiar with the procedural guidelines contained in this document.

This document focuses on the preparation for and conduct of inspections, including (1) how to proceed when entry is denied, (2) under what circumstances a warrant is necessary, and (3) what showing is necessary to obtain a warrant.

II. *Conduct of Inspections*

The following material examines the procedural aspects of conducting inspections under EPA-administered Acts. Inspections are considered in three stages: (1) preparation for inspection of premises, (2) entry onto premises, and (3) procedures to be followed where entry is refused.

A. *Preparation*

Adequate preparation should include consideration of the following factors concerning the general nature of warrants and the role of personnel conducting inspections.

(1) *Seeking a Warrant Before Inspection*

The *Barlow's* decision recognized that, on occasion, the Agency may wish to obtain a warrant to conduct an inspection even before there has been any refusal to allow entry. Such a warrant may be necessary when surprise is particularly crucial to the inspection, or when a com-

pany's prior bad conduct and prior refusals make it likely that warrantless entry will be refused. Pre-inspection warrants may also be obtained where the distance to a U.S. Attorney or a magistrate is considerable so that excessive travel time would not be wasted if entry were denied. At present, the seeking of such a warrant prior to an initial inspection should be an exceptional circumstance, and should be cleared through Headquarters. If refusals to allow entry without a warrant increase, such warrants may be sought more frequently. (For specific instructions on how to obtain a warrant, see Part D.)

(2) *Administrative Inspections v. Criminal Investigations*

It is particularly important for both inspectors and attorneys to be aware of the extent to which evidence sought in a civil inspection can be used in a criminal matter, and to know when it is necessary to secure a criminal rather than a civil search warrant. There are three basic rules to remember in this regard: (1) If the purpose of the inspection is to discover and correct, through civil procedures, noncompliance with regulatory requirements, an administrative inspection (civil) warrant may be used; (2) if the inspection is in fact intended, in whole or in part, to gather evidence for a possible criminal prosecution, a criminal search warrant must be obtained under Rule 41 of the Federal Rules of Criminal Procedure; and (3) evidence obtained during a valid civil inspection is generally admissible in criminal proceedings. These principles arise from the recent Supreme Court cases of *Marshall v. Barlow's, Inc., supra; Michigan v. Tyler*, —— U.S. ——, 98 S.Ct. 1942 (1978); and *U.S.* v. *LaSalle National Bank*, —— U.S. ——, 57 L. Ed. 2d 221 (1978). It is not completely clear whether a combined investigation for civil and criminal violations may be properly conducted under a civil or "administrative" warrant, but we believe that a civil warrant can properly be used unless the intention is clearly to conduct a criminal investigation.

(3) *The Use of Contractors to Conduct Inspections*

Several programs utilize private contractors to aid in the conduct of inspections. Since, for the purpose of inspections, these contractors are agents of the Federal government, the restrictions of the *Barlow's* decision also apply to them. If contractors are to be conducting inspections without the presence of actual EPA inspectors, these contractors should be given training in how to conduct themselves when entry is refused. With respect to obtaining or executing a warrant, an EPA inspector should always participate in the process, even if he was not at the inspection where entry was refused.

(4) *Inspections Conducted by State Personnel*

The *Barlow's* holding applies to inspections conducted by State personnel and to joint Federal/State inspections. Because some EPA programs are largely implemented through the States, it is essential that the Regions assure that State-conducted inspections are conducted in compliance with the *Barlow's* decision, and encourage the State inspectors to consult with their legal advisors when there is a refusal to allow entry for inspection purposes. State personnel should be encouraged to contact the EPA Regional Enforcement Office when any questions concerning compliance with *Barlow's* arise.

With regard to specific procedures for States to follow, the important points to remember are: (1) The State should not seek forcible entry without a warrant or penalize an owner for insisting upon a warrant, and (2) the State legal system should provide a mechanism for issuance of civil administrative inspection warrants. If a State is enforcing an EPA program through a State statute, the warrant process should be conducted through the State judicial system. Where a State inspector is acting as a contractor to the Agency, any refusal to allow entry should be handled as would a refusal to an Agency inspector as described in section II.B.3. Where a State in-

spector is acting as a State employee with both Federal and State credentials, he should utilize State procedures unless the Federal warrant procedures are more advantageous, in which case, the warrant should be sought under the general procedures described below. The Regions should also assure that all States which enforce EPA programs report any denials of entry to the appropriate Headquarters Enforcement Attorney for the reasons discussed in section II.B.4.

B. *Entry*

(1) *Consenual Entry*

One of the assumptions underlying the Court's decision is that most inspections will be consensual and that the administrative inspection framework will thus not be severely disrupted. Consequently, inspections will normally continue as before the *Barlow's* decision was issued. This means that the inspector will not normally secure a warrant before undertaking an inspection but, in an attempt to gain admittance, will present his credentials and issue a notice of inspection where required. The establishment owner may complain about allowing an inspector to enter or otherwise express his displeasure with EPA or the Federal government. However, as long as he allows the inspector to enter, the entry is voluntary and consensual unless the inspector is expressly told to leave the premises. On the other hand, if the inspector has gained entry in a coercive manner (either in a verbal or physical sense), the entry would not be consensual.

Consent must be given by the owner of the premises or the person in charge of the premises at the time of the inspection. In the absence of the owner, the inspector should make a good faith effort to determine who is in charge of the establishment and present his credentials to that person. Consent is generally needed only to inspect the non-public portions of an establishment—i.e., any evi-

dence that an inspector obtains while in an area open to the public is admissible in an enforcement proceeding.

(2) *Withdrawal of Consent*

The owner may withdraw his consent to the inspection at any time. The inspection is valid to the extent to which it has progressed before consent was withdrawn. Thus, observations by the inspector, including samples and photographs obtained before consent was withdrawn, would be admissible in any subsequent enforcement action. Withdrawal of consent is tantamount to a refusal to allow entry and should be treated as discussed in section II.B.3. below, unless the inspection had progressed far enough to accomplish its purposes.

(3) *When Entry is Refused*

Barlow's clearly establishes that the owner does have the right to ask for a warrant under normal circumstances.[1] Therefore, refusal to allow entry for inspectional purposes will not lead to civil or criminal penalties if the refusal is based on the inspector's lack of a warrant and one of the exemptions discussed in Part C does not apply. If the owner were to allow the inspector to enter his establishment only in response to a threat of enforcement liability, it is quite possible that any evidence obtained in such an inspection would be inadmissible. An inspector may, however, inform the owner who refuses entry that he intends to seek a warrant to compel the inspection. In any event, when entry is refused, the inspector should leave the premises immediately and telephone the designated Regional Enforcement Attorney as soon as possible for further instructions. The Regional Enforcement Attorney should contact the U.S. Attorney's Office for the district in which the establishment desired to be inspected is located and explain to the appropriate Assist-

[1] FIFRA inspections are arguably not subject to this aspect of *Barlow's*. See discussion, p. 5 and 6.

ant United States Attorney the need for a warrant to conduct the particular inspection. The Regional Attorney should arrange for the United States Attorney to meet with the inspector as soon as possible. The inspector should bring a copy of the appropriate draft warrant and affidavits. Samples are provided in the appendix to this document.

(4) *Headquarters Notification*

It is essential that the Regions keep Headquarters informed of all refusals to allow entry. The Regional Attorney should inform the appropriate Headquarters enforcement attorney of any refusals to enter and should send a copy of all papers filed to Headquarters. It is necessary for Headquarters to monitor refusals and Regional success in obtaining warrants to evaluate the need for improved procedures and to assess the impact of *Barlow's* on our compliance monitoring programs.

C. *Areas Where a Right of Warrantless Entry Still Exists*

(1) *Emergency Situations.*

In an emergency, where there is no time to get a warrant, a warrantless inspection is permissible. In *Camara v. Municipal Court*, 387 U.S. 523 (1967), the Supreme Court states that "nothing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations". Nothing stated in *Barlow's* indicates any intention by the court to retreat from this position. The Regions will always have to exercise considerable judgment concerning whether to secure a warrant when dealing with an emergency situation. However, if entry is refused during an emergency, the Agency would need the assistance of the U.S. Marshal to gain entry, and a warrant could probably be obtained during the time necessary to secure that Marshal's assistance.

An emergency situation would include potential imminent hazard situations, as well as, situations where there is potential for destruction of evidence or where evidence of a suspected violation may disappear during the time that a warrant is being obtained.

(2) *FIFRA Inspections.*

There are some grounds for interpreting *Barlow's* as not being applicable to FIFRA inspections. The *Barlow's* restrictions do not apply to areas that have been subject to a long standing and pervasive history of government regulation. An Agency administrative law judge held recently that even after the *Barlow's* decision, refusal to allow a warrantless inspection of a FIFRA regulated establishment properly subjected the owner to civil penalty. *N. Jonas & Co., Inc.*, I.F. & R Docket No. III-121C (July 27, 1978). For the present, however, FIFRA inspections should be conducted under the same requirements applicable to other enforcement programs.

(3) *"Open Fields" and "In Plain View" situations.*

Observation by inspectors of things that are in plain view, (*i.e.*, of things that a member of the public could be in a position to observe) does not require a warrant. Thus, an inspector's observations from the public area of a plant or even from certain private property not closed to the public are admissible. Observations made even before presentation of credentials while on private property which is not normally closed to the public are admissible.

D. *Securing a Warrant*

There are several general rules for securing warrants. Three documents have to be drafted: (a) an application for a warrant, (b) an accompanying affidavit, and (c) the warrant itself. Each document should be captioned with the District Court of jurisdiction, the title of the action, and the title of the particular document.

The application for a warrant should generally identify the statutes and regulations under which the Agency is seeking the warrant, and should clearly identify the site or establishment desired to be inspected (including, if possible, the owner and/or operator of the site). The application can be a one or two page document if all of the factual background for seeking the warrant is stated in the affidavit, and the application so states. The application should be signed by the U.S. Attorney or by his Assistant U.S. Attorney.

The affidavits in support of the warrant application are crucial documents. Each affidavit should consist of consecutively numbered paragraphs, which describe all of the facts that support warrant issuance. If the warrant is sought in the absence of probable cause, it should recite or incorporate the neutral administrative scheme which is the basis for inspecting the particular establishment. Each affidavit should be signed by someone with personal knowledge of all the facts stated. In cases where entry has been denied, this person would most likely be the inspector who was denied entry. Note that an affidavit is a *sworn* statement that must either be notarized or personally sworn to before the magistrate.

The warrant is a direction to an appropriate official (an EPA inspector, U.S. Marshal or other Federal officer) to enter a specifically described location and perform specifically described inspection functions. Since the inspection is limited by the terms of the warrant, it is important to specify to the broadest extent possible the areas that are intended to be inspected, any records to be inspected, any samples to be taken, any articles to be seized, etc. While a broad warrant may be permissible in civil administrative inspections, a vague or overly broad warrant will probably not be signed by the magistrate and may prove susceptible to constitutional challenge. The draft warrant should be ready for the magistrate's signature at the time of submission via a motion to quash and

suppress evidence in Federal District court. Once the magistrate signs the draft warrant, it is an enforceable document. Either following the magistrate's signature or on a separate page, the draft warrant should contain a "return of service" or "certificate of service". This portion of the warrant should indicate upon whom the warrant was personally served and should be signed and dated by the inspector. As they are developed, more specific warrant-issuance documents will be drafted and submitted to the Regions.

E. *Standards or Bases for the Issuance of Administrative Warrants.*

The *Barlow's* decision establishes three standards or bases for the issuance of administrative warrants. Accordingly, warrants may be obtained upon a showing: 1) of traditional criminal probable cause, 2) of civil probable cause, or 3) that the establishment was selected for inspection pursuant to a neutral administrative inspection scheme.

1. *Civil specific probable cause warrant.*

Where there is some specific probable cause for issuance of a warrant, such as an employee complaint or competitor's tip, the inspector should be prepared to describe to the U.S. Attorney in detail the basis for this probable cause.

The basis for probable cause will be stated in the affidavit in support of the warrant. This warrant should be used when the suspected violation is one that would result in a civil penalty or other civil action.

2. *Civil probable cause based on a neutral administrative inspection scheme.*

Where there is no specific reason to think that a violation has been committed, a warrant may still be issued if

the Agency can show that the establishment is being inspected pursuant to a neutral administrative scheme. As the Supreme Court stated in *Barlow's*:

> "Probable cause in the criminal law sense is not required. For purposes of an administrative search, such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation, but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]". A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the act derived from neutral sources such as, for example, dispersion of employees in various type of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employers Fourth Amendment rights."

Every program enforced by the Agency has such a scheme by which it prioritizes and schedules its inspections. For example, a scheme under which every permit holder in a given program is inspected on an annual basis is a satisfactory neutral administrative scheme. Also, a scheme in which one out of every three known PCB transformer repair shops is inspected on an annual basis is satisfactory, as long as, neutral criteria such as random selection are used to select the individual establishment to be inspected. Headquarters will prepare and transmit to the Regions the particular neutral administrative scheme under which each program's inspections are to be conducted. Inspections not based on specific probable cause must be based on neutral administrative schemes for a warrant to be issued. Examples of two neutral administrative schemes are provided in the appendix. (Attachments II and III)

The Assistant U.S. Attorney will request the inspector to prepare and sign an affidavit that states the facts as he knows them. The statement should include the sequence of events culminating in the refusal to allow entry and a recitation of either the specific probable cause or the neutral administrative scheme which led to the particular establishment's selection for inspection. The Assistant U.S. Attorney will then present a request for an inspection warrant, a suggested warrant, and the inspector's affidavit to a magistrate or Federal district court judge.[2]

3. *Criminal Warrants.*

Where the purpose of the inspection is to gather evidence for a criminal prosecution, the inspector and the Regional Attorney should request that the U.S. Attorney seek a criminal warrant under Rule 41 of the Federal

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[2] The *Barlow's* decision states that imposing the warrant requirement on OSHA would not invalidate warrantless search provisions in other regulatory statutes since many such statutes already "envision resort to Federal court enforcement when entry is refused". There is thus some question as to whether the existence of a non-warrant Federal court enforcement mechanism in a statute requires the use of that mechanism rather than warrant issuance. We believe that the *Barlow's* decision gives the agency the choice of whether to proceed through warrant issuance or through an application for an injunction, since the decision is largely based on the fact that a warrant procedure imposes virtually no burden on the inspecting agency. In addition, an agency could attempt to secure a warrant prior to inspection on an *ex parte* basis, something not available under normal injunction proceedings. Several of the acts enforced by EPA have provisions allowing the Administrator to seek injunctive relief to assure compliance with the various parts of a particular statute. There may be instances where it would be more appropriate to seek injunctive relief to gain entry to a facility than to attempt to secure a warrant for inspection, although at this point we cannot think of any. However, since the warrant process will be far more expeditious than the seeking of an injunction, any decision to seek such an injunction for inspection purposes should be cleared through appropriate Headquarters staff.

Rules of Criminal Procedure. This requires a specific showing of probable cause to believe that evidence of a crime will be discovered. Agency policy on the seeking of criminal warrants has not been affected by *Barlow's*. The distinction between administrative inspections and criminal warrant situations is discussed in Section II.A.2.

F. *Inspecting with a Warrant*

Once the warrant has been issued by the magistrate or judge, the inspector may proceed to the establishment to commence or continue the inspection. Where there is a high probability that entry will be refused even with a warrant or where there are threats of violence, the inspector should be accompanied by a U.S. Marshal when he goes to serve the warrant on the recalcitrant owner. The inspector should never himself attempt to make any forceful entry of the establishment. If the owner refuses entry to an inspector holding a warrant but not accompanied by a U.S. Marshal, the inspector should leave the establishment and inform the Assistant U.S. Attorney and the designated Regional Attorney. They will take appropriate action such as seeking a citation for contempt. Where the inspector is accompanied by a U.S. Marshal, the Marshal is principally charged with executing the warrant. Thus, if a refusal or threat to refuse occurs, the inspector should abide by the U.S. Marshal's decision whether it is to leave, to seek forcible entry, or otherwise.

The inspector should conduct the inspection strictly in accordance with the warrant. If sampling is authorized, the inspector must be sure to carefully follow all procedures, including the presentation of receipts for all samples taken. If records or other property are authorized to be taken, the inspector must receipt the property taken and maintain an inventory of anything taken from the premises. This inventory will be examined by the magistrate to assure that the warrant's authority has not been exceeded.

G. *Returning the Warrant.*

After the inspection has been completed, the warrant must be returned to the magistrate. Whoever executes the warrant, (i.e., whoever performs the inspection), must sign the return of service form indicating to whom the warrant was served and the date of service. He should then return the executed warrant to the U.S. Attorney who will formally return it to the issuing magistrate or judge. If anything has been physically taken from the premises, such as records or samples, an inventory of such items must be submitted to the court, and the inspector must be present to certify that the inventory is accurate and complete.

III. *Conclusion*

Except for requiring the Agency to formalize its neutral inspection schemes, and for generally ending the Agency's authority for initiating civil and/or criminal actions for refusal to allow warrantless inspections, *Barlow's* should not interfere with EPA enforcement inspections.

Where there is doubt as to how to proceed in any entry case, do not hesitate to call the respective Headquarters program contact for assistance.

/s/ Marvin B. Durning
MARVIN B. DURNING

EXCERPTS OF UNIDENTIFIED EPA DOCUMENT

* * * * *

d) if a sampling team encounters resistance at the facility, the team leader should

telephone the responsible OGC attorney and await further instructions; and

e) where a sampling visit is cancelled, whether in advance or on-site, an OGC attorney should draft a Section 308 letter which asks the company to document the reasons why the sampling visit was cancelled.

3) A company must be notified that it may assert a claim of business confidentiality as to any information obtained in the sampling visit. See Section G below, Confidentiality Issues.

e. When entry is refused—Warrants.

1) *Marshall* v. *Barlows Inc.*, 436 U.S. 307 (1978), establishes that an owner or manager of an industrial facility does have the right to ask for a warrant as a prerequisite to entry under normal circumstances. Therefore, refusal to allow entry for inspection purposes will not lead to civil or criminal penalties if the refusal is based on the inspector's lack of a warrant.

2) If denied entry the inspector should leave the premises immediately and telephone the designated OGC or Regional Enforcement Attorney as soon as possible for further instructions.

3) If the inspector is an EPA employee the contacted Attorney should get in touch with the U.S. Attorney's Office for the district in which the establishment sought to be inspected is located and explain to the appropriate Assistant United States Attorney the need for a warrant to conduct the particular inspection. The At-

torney should arrange for the United States Attorney to meet with the inspector as soon as possible. The inspector should bring a copy of the appropriate draft warrant and affidavits. Samples are provided at the end of this chapter. (Attachments 4, 5, and 6)

a) If the inspector is an EPA contractor a warrant should not be sought without first checking within OGC and the Office of Enforcement.

f. Use of contractors

1) Whether contract personnel are "authorized representatives" for purposes of entry under Section 308 may be disputed.

a) While the Agency maintains that contractors are included within the term "authorized representatives," a federal court in Wyoming ruled on May 27, 1980 that under the Clean Air Act the term excludes contractors. (*In the Matter of Stauffer Chemical Company of Wyoming and Stauffer Chemical Company*, 14 ERC 1737.) This case is being appealed. (The CAA and CWA provisions are virtually identical).

2) If an EPA contractor is denied access to a facility do not seek a warrant. The OGC attorney should consult appropriate persons within OGC and the Office of Enforcement for further instructions.

3) What if a company requires a signed secrecy agreement between a company and a contractor as a prerequisite to the contractor's entry?

a) Under 40 CFR § 2.215 no EPA officer, employee, contractor or subcontractor can enter into any confidentiality agreement unless the

agreement is consistent with the Agency's confidentiality rules.

b) In the past, various types of secrecy agreements have been signed—some of which limited EPA's access to and use of the information. This is to be avoided. The attached "Memorandum on Confidential Treatment of Certain Information" is consistent with Agency regulations and may be used with those sources that would otherwise oppose EPA's use of contractors. (Attachment 7)

g. Plant visit reports—

1) Whenever EPA inspectors (including contractors) visit plant sites a copy of the trip report should be sent back to the plant so that erroneous or incomplete information can be noted and confidential treatment of certain information can be requested.

2) If a business asserts a business confidentiality claim for information obtained as a result of the * * *

ATTACHMENT 4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF

IN THE MATTER OF: COMPANY

APPLICATION FOR ADMINISTRATIVE WARRANT

NOW COMES the Administrator of the Environmental Protection Agency (EPA) by and through the United States Attorney, and applies for an administrative warrant to enter, inspect and copy records pertaining to discharges of any effluents, inspect effluent monitoring equipment and sample effluents at the facility of the Company known as the plant located at . Said entry is for the purposes of collecting data for the development of effluent limitation guidelines, new source performance standards and pretreatment standards and is requested pursuant to the authority granted to the Administrator by Section 308(a) of the Clean Water Act, 33 U.S.C. 1318(a). In support of this application, the Administrator respectfully submits an affidavit and a proposed warrant.

_____
United States Attorney

By: _____
Assistant United States Attorney

ATTACHMENT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF

IN THE MATTER OF: COMPANY

AFFIDAVIT IN SUPPORT OF APPLICATION FOR WARRANT TO ENTER AND INSPECT PURSUANT TO THE CLEAN WATER ACT
(33 U.S.C. § 1251 *et seq.*)

Ernst P. Hall, being duly sworn upon his oath according to law, deposes and says:

1. I am the Chief, Metals and Machinery Branch, Effluent Guidelines Division, Office of Water Planning and Standards of the U.S. Environmental Protection Agency, Washington, D.C. I am in charge of the development of effluent limitation guidelines and new source performance standards, and pretreatment standards for the metals and machinery industries as is more fully set out below.

2. This affidavit is made in support of an application for an administrative warrant to enter an aluminum forming facility owned and operated by the Company located at , known as the plant, pursuant to the inspection, monitoring and entry authority vested in the Administrator of the Environmental Protection Agency by Section 308(a) of the Clean Water Act, 33 U.S.C. 1318(a).

3. The U.S. Environmental Protection Agency (EPA) is required to develop effluent limitation guidelines, new source performance standards and pretreatment standards for the discharge of pollutants by Sections 301(b), 304(b), 306(b) and 307(a), (b), (c) of the Clean Water Act (the Act), 33 U.S.C. 1311(b), 1314(b), 1316(b) and 1317(a), (b) and (c). In developing these limita-

tions and standards EPA must consider a number of factors, including; the degree of effluent reduction attainable by the use of various technologies, cost, benefits, age of equipment, process employed, engineering aspects of the application of various types of control technologies, process changes, non-water quality environmental impact and other such factors as the Administrator deems appropriate. *See* Sections 304(b)(1)(B), (b)(2)(A), and (B), (b)(4)(B), (c) and (g) of the Act; 33 U.S.C. 1314(b)(1)(B), (b)(2)(A) and (B), (b)(4)(B), (c) and (g). The limitations and standards are to be developed for classes and categories of point sources. Section 304(b)(1)(A), (b)(2)(A), (b)(4)(A) and (g)(2) of the Act; 33 U.S.C. 1314(b)(1)(A), (b)(2)(A), (b)(4)(A) and (g)(2). The entry sought in this proceeding is for the purpose of developing effluent limitations guidelines, new source performance standards and pretreatment standards, and is not for purposes of enforcement.

4. Section 308 of the Act, 33 U.S.C. 1318, entitled "Inspection, Monitoring and Entry", provides the Administrator of the Agency with broad data gathering and investigative powers. This Section provides, in part, that:

> (a) Whenever required to carry out the objective of this Act, including but not limited to (1) developing or assistance in the development of any effluent limitation, or other limitation, prohibition, or standard of performance under this Act . . .
>
> (A) the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with with such methods, at such locations, at such intervals, and in such man-

ner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require; and

(B) the Administrator or his authorized representative, upon presentation of his credentials—

(i) shall have a right of entry to, upon, or through any premises in which an effluent source is located or in which any records required to be maintained under clause (A) of this subsection are located, and

(ii) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under clause (A), and sample any effluents which the owner or operator of such source is required to sample under such clause.

5. The Administrator's authority to enter upon any premise on which an effluent source is located, copy records, inspect monitoring equipment, sample effluents or carry out or require the carrying out of any other activity under Section 308(a)(B) of the Clean Water Act has been delegated to me. *See* Chapter 2-13 of the EPA Delegations Manual and attached memoranda delegating the authority (Appendix A).

6. The development of the effluent limitations and standards for the Aluminum Forming category of which Company is a member is proceeding under a time schedule mandated by a Settlement Agreement between the National Resources Defense Council, Inc. and the EPA. *N.R.D.C.* v. *Train*, 8 ERC 2120 (D.C. D.C. 1976). The Settlement Agreement entered by the court required the promulgation of effluent limitation guidelines, new source performance standards and pretreatment standards for 21 industrial categories on a specific time table. Because EPA is proceeding under a court ordered timetable we must proceed in as expedi-

tiously a manner as possible. Delays in the acquisition of data jeopardize the whole schedule. For this reason EPA must insist on prompt response to requests for data, sampling and access to facilities.

7. One thrust of the Settlement Agreement was to require EPA to consider the development of limitations on 65 toxic substances in industrial discharges. To carry out this mandate the Agency examines industrial wastewaters, both raw and treated, for these substances, studies the treatment processes, and promulgate appropriate effluent limitations and standards. One of the reasons that the plant was chosen for sampling is that some of these toxic substances are believed to be used in the aluminum forming operations at the plant, and it is, therefore, highly likely that these toxic substances are present in the effluents.

8. The primary means of gathering information on the presence of toxic pollutants in the effluents of various processes and the efficiency of treatment processes in removing the pollutants is the investigation and sampling of actual plants. The Agency knows of no other way to gather data of comparable breadth, depth and applicability to its needs in the time available for the development of the limitations and standards. This method involves going onto the premises of industrial plants in the category being studied and taking samples of the effluent streams from production processes and the effluents from treatment systems. These samples are then analyzed to determine the presence or absence and quantify the amount of specific pollutants and the efficiency of removal of the treatment system. During the sampling visit the investigators also gather data relating to the production occurring during the visit so that it can be correlated with the observed pollutant loads. This method has been used at approximately plants in all of the 21 categories at this point in time. The process generally known as "screening" is used to determine the presence or

absence of pollutants and is normally followed by a procees known as "verification" in which more detailed chemical analysis, based on the findings of the screening results, is performed to quantify the pollutants. At this stage in the Aluminum Forming study we are simultaneously performing screening and verification sampling and analysis.

9. The effluent limitations, new source performance standards and pretreatment standards for each category are incorporated into regulations to be used in developing effluent limitations for individual plants for inclusion in National Pollutant Discharge Elimination System permits pursuant to Section 402 of the Act, 33 U.S.C. 1342. It is highly unlikely that there are any two plants, even within the same category, which are identical in terms of process and product mixes. Therefore, it is necessary to determine the pollution potential and treatment methodology for individual processes within an industrial complex and correlate this data with production data. The characteristics of individual processes can then be combined in building block fashion to develop permit requirements based on the configuration and production of the actual plant.

10. The rationale for screening and verification plant selection is to choose a group of plants which collectively employ all of the processes under consideration and from which the maximum amount of priority pollutant information can be obtained. Specific factors considered in plant selection include processes employed, representativeness of a process, availability of information on the facility, use of the toxic chemicals common to the process, effectiveness of treatment systems installed, ability to separate process waste streams for sampling and analysis, size, age and geographical location. Larger facilities are frequently chosen so that more processes can be sampled during one sampling visit. Visits are also sometimes

scheduled to gather information on a facility about which little is known.

11. One of the 21 point source categories for which effluent limitation guidelines, new source performance standards, and pretreatment standards are to be developed is Machinery and Mechanical Products Manufacturing.

12. There were 175 SIC codes listed under Machinery and Mechanical Products Manufacturing and EPA estimates that these SIC codes include 110,000 manufacturing facilities. Because the size and complexity of Machinery and Mechanical Products Manufacturing made it too unwieldy for effective project management and regulation development, it was divided into eleven smaller categories, one of which is Aluminum Forming. Aluminum Forming has tentatively been assigned Part 467 of Title 40 of the Code of Federal Regulations.

13. The major processes used in the Aluminum Forming category are as follows:

Hot rolling
Cold rolling
Foil rolling
Extruding
Heat treating
Chemical cleaning and etching
Forging
Drawing
Can making

Finer differentiation of processes may be necessary based upon differences found during the course of the study, such as variations in water use and discharge, wastewater pollutants, etc. For example, it may be necessary to differentiate hot rolling of bar from hot rolling of sheet and plate. Because the approach used to develop the guidelines is based on individual processes it is necessary to sample the raw wastes from each process sepa-

rately to determine and quantify the presence or absence of pollutants in wastes from each process. Dilution or other effects may mask the presence of a pollutant in the effluent from a single process at a multiple process plant. In the case of plants with multiple processes, such as , sampling the combined influent to the plant-wide wastewater treatment system would only characterize the effluent of the overall plant wastewater, and would be useless to adequately characterize the wastes from the individual processes at the plant. By contrast, sampling of the raw waste from a particular process would assist in characterizing that process at many plants.

14. It is presently anticipated that seven plants in the Aluminum Forming category will be visited for combined screen and verification sampling. EPA's present projection for separate verification sampling is 30 additional plants.

15. Based on the information available within the Division, the plant is believed to be ideal for screening and verification for the following reasons: it contains a wider variety of processes than other plants; these processes are generally representative of the industry; the treatment systems are highly sophisticated; the treatment systems handle an wider variety of wastes than is typical of the industry; the wastes streams are separate and can be readily sampled; the plant is believed to use toxic chemicals which may be common in the industry; it is much larger that most plants in the industry; represents a major part of the industry; and the plant is about average in age for the industry.

16. A site visit has already been made to the plant by the EPA Project Officer and the technical contractor (Sverdrup & Parcel and Associates, Inc.). During the visit the Project Officer and the contractor tentatively identified 23 sampling locations which would provide data suitable for characterization of the various processes and treatment systems. The sites are listed in Appendix B.

17. Samples and production data gathered at the plant would provide data on the following processes:

Hot rolling of sheet and plate
Cold rolling of sheet and plate
Chemical cleaning and etching of sheet and plate
Heat treating of sheet and plate

18. Although some of the processes to be examined by the proposed screening program at the plant have already been covered, at least partially, at other screening plants, we believe that the rolling oils used on the processes at the plant differ substantially from those sampled previously. We also believe the chemical cleaning agents are different. This could make a substantial difference in the toxic pollutants present in the wastewater.

19. The plant has operations (such as conversion coating and painting) which are not within the scope of the Aluminum Forming category but which will require sampling at the same time. Many other aluminum forming plants also have similar extraneous operations. In addition, it is necessary for us to sample the effluents from these other processes at the same time we sample the aluminum forming processes so that we can segregate the effects of effluents from the aluminum forming processes from the others.

20. The investigations to be performed pursuant to the administrative warrant sought in this action will be performed under the supervision of me or a member of my staff, by employees of Inc., a contractor employed by the EPA for this purpose. The employees of Inc. are duly authorized representatives of the EPA for purposes of this study. Section 308(a) of the Act, 33 U.S.C. 1318(a), specifically provides that either the Administrator or his authorized representative has the right of access requested here.

21. The locations of the points at which we desire to take samples and the methodology to be employed at each sampling point is detailed in Appendix B to this affidavit, which is incorporated by reference. It may be that upon commencing the actual sampling the on-site investigator will desire to modify the sampling points or methodology slightly. The warrant sought must provide for a limited amount of professional judgment in selecting the exact sampling points and methodologys. For example, the sampling site may be shifted closer to or farther from the process or the sample type may be charged from composite to grab or vice versa. The processes investigated, however, will not be varied.

22. The warrant must provide for sufficient time for the contract personnel and equipment to be assembled and transported to the site. This process may take 5 days to complete. The sampling can be completed within days of the arrival of the sampling crew. However, more time may be required if one or more of the processes to be sampled is not operating when the crew is on site.

ERNST P. HALL, Chief
Metals and Machinery Branch

Sworn and Subscribed before me this — day of October, 1978.

_____

Notary Public

NPDES COMPLIANCE INSPECTION DEFINITIONS

Compliance Evaluation Inspection (CEI). PCS Code "C"

A CEI is non-sampling in nature and designed to verify permittee compliance with applicable NPDES permit requirements and compliance schedules. This inspection is based on record reviews and cursory observations such as walk-through evaluations of waste sources and wastewater treatment facilities, visual observations of effluents, receiving waters, etc. The CEI applies to both chemical and biological self-monitoring programs of the permittee. The CEI is the least resource-intensive NPDES compliance inspection because specific unit operations which make up the permittee's self-monitoring program are not evaluated in depth by the inspection team.

Performance Audit Inspection (PAI). PCS Code "A"

The PAI focuses on quality assurance of the permittee's self-monitoring program by evaluation of permittee performance and/or simulation of all the steps in the NPDES self-monitoring process from sample collection and flow measurement through laboratory analyses, data workup, and reporting. The PAI still includes the basic objectives and tasks of a CEI and applies to both chemical and biological self-monitoring programs. The PAI is more resource intensive than a CEI because of the additional effort and ability required for in-depth evaluation of the permittee's self-monitoring tasks, but is generally less resource intensive than a CSI because sample collection and analyses are not a part of the inspection.

Compliance Sampling Inspection (CSI). PCS Code "S"

During the CSI a representative sample(s) of a permittee's effluent is collected and chemically analyzed. The results of the analyses are used to verify the ac-

curacy of the permittee's self-monitoring program and reports, gather evidence for enforcement proceedings, determine the quantity and quality of effluents, etc. In addition, a CSI includes the same objectives and tasks as a CEI.

Compliance Biomonitoring Inspection (CBI). PCS Code "B"

A CBI evaluates the biological effect of a permittee's effluent discharge(s) on test organisms through the utilization of acute toxicity bioassay techniques. In addition this inspection includes the same objectives and tasks as a CEI.

Toxics Sampling Inspection (XSI). PCS Code "X"

The XSI has the same overall objectives as a conventional CSI; however, it places increased emphasis on toxic substances (i.e. the priority pollutants) other than heavy metals, phenols and cyanide, which are typically included in a CSI. Increased resources over a CSI are needed because highly sophisticated techniques are used to analyze samples containing these pollutants.

Construction Verification Inspections Conducted by the Corps of Engineers. PCS Code "E"

The Corps will perform inspections of major municipal wastewater treatment facilities being financed under EPA's construction grants program. These inspections will mainly be limited to those parts of the CEI which directly concern the facility's actual construction progress, except for a *cursory* visual description of the nature of the effluent.

Pretreatment Compliance Evaluation Inspection. PCS Code "P"

It is a modified CEI which verifies that an industrial user is in compliance with pretreatment standards. Applicable sections of the NPDES Compliance Inspection report are completed in order to summarize the findings of the inspection.

Dredge and Fill Compliance Evaluation Inspection. PCS Code "D"

It is a modified CEI which verifies that a permittee is in compliance with all permit conditions and limitations granted in accordance with Section 404 of the Clean Water Act.

EPA

United States
Environmental Protection
Agency

Office of Water Enforcement
Enforcement Division (EN-338)
Washington, D.C. 20460

January 1981

Water

NPDES
COMPLIANCE EVALUATION
INSPECTION MANUAL

MCD—75

SECTION 11

ACCESS AND WARRANTS

I. GENERAL

The Act grants the Administrator or his authorized representative the authority to:

A. Enter a facility or the place where effluent records are held;

B. Inspect the permittee's monitoring equipment and techniques;

C. Inspect and copy the permittee's self-monitoring records;

D. Take samples of discharges which the permittee is required to sample; and

E. Examine any other records which the Administrator requires to be kept as delineated in Section IV of this manual.

All of the above should be done, whenever practical, during the normal working hours observed at the permittee's facility (e.g., office hours at a steel mill even though operating three shifts) after presentation of credentials. However, the taking of composite samples over an extended period to confirm compliance with permit limitation will not be considered contrary to this requirement so long as the sampling commences during normal working hours. If initial entry to the premises of an alleged "midnight dumper" is to be made after normal working hours, prior instructions from an Enforcement or Regional Counsel Attorney must be obtained and followed.

All permitting authorities are subject to the "Unreasonable Search and Seizure" provisions of

the Fourth Amendment to the Constitution. The ability to use statements (including supportive documents) by permittees or their agents, samplers and analysts, may also be subject to the limitations of the "privilege against self incrimination" provisions of the Fifth Amendment. This limitation may occur directly as a result of Federal action, or indirectly as a result of State action through interpretation of the "due process" provision of the Fourteenth Amendment. The applications will be discussed in the following subsections.

The Act also gives the Administrator or a designee authority to require a permittee (on a non-routine basis) to provide other information as may be reasonably required in order to determine if the permittee is complying with the law. The inspector may wish to make use of this authority as the designee of the Administrator in order to request information not contained in records which the permittee is required to maintain under the terms of the permit. Examples of this type of material are:

1. Changes of processes, products, or volume of discharge;
2. Treatment processes, and the interrelationship of components; and
3. Purchases of equipment, etc.

Since these materials are first being requested "on-site", the instructions to the inspector on what to do if entry or information is refused do not apply. The inspector should, if this material is not forthcoming, continue the inspection. However, make note of the information or documents requested but not received so that the same may thereafter be requested in the form of a Section 308 letter.

II. OBJECTIVES

The objectives of this section are to inform or advise the inspector of:

A. The need for obtaining consent prior to entry, or sampling;

* * * *

V. RIGHT OF ENTRY

The following procedures are to be followed when entering a facility for the purpose of conducting a NPDES Compliance Inspection.

A. All inspectors shall have in their possession credentials which identify them as EPA inspectors and any safety equipment required during an NPDES inspection.

B. One inspector shall be in charge of the inspection team, and this inspector will be referred to as the team leader in the following instructions. All inspections shall be commenced during normal work hours of the premises. There is no objection to reentry thereafter outside normal working hours for the purpose of taking or checking composite samples or conducting flow-through biomonitoring.

C. Upon arrival at the facility, the team leader shall ask for the facility representative, who has been designated through the 308 letter response, or in his/her absence the person in charge of the premises at the time of the inspection (in either case, hereafter referred to as the "facility representative").

D. The team shall not:

1. Have any dealings with gate guards other than to ask for the facility representative;

2. Make any *threats* or *statements* as to the consequences of denial of entry to the gate guard, facility representative or other personnel at the facility; or

3. Sign any waiver of responsibility or liability.

E. Upon contact with the facility representative, the team leader shall present all necessary credentials and explain the purpose of the inspection. All other inspectors shall also display their credentials. The team leader shall state that the purpose of the inspection is as follows:

1. It is an NPDES inspection dealing with water and is authorized by Section 308 of the Clean Water Act.

2. A review will be performed of all self-monitoring and other records which are required by the permit.

3. It will include a review of all the pollution control systems at the facility.

4. If appropriate, it is a sampling inspection and samples will be taken at the facility's discharge and other NPDES permit-designated monitoring points.

5. If appropriate, it is a biomonitoring inspection to determine the relative toxicity of the effluent.

F. If you are denied entry under the following circumstances:

1. By the gate guard, then ask for the facility representative. If the guard refuses to make the call, leave immediately without

challenge or argument, making *no statements*;

2. By the facility representative, after identifying yourself and presenting your credentials, leave immediately without challenge or argument, making *no statements*.

G. If a confidentiality agreement is required as a prerequisite to entry, the inspector shall refuse to sign it and contact the Regional Enforcement Division for further instructions.

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No. 83-1290

In the Supreme Court of the United States

OCTOBER TERM, 1983

MOBIL OIL CORPORATION, PETITIONER

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Section 308 of the Clean Water Act, 33 U.S.C. 1318, authorizes EPA to enter the facilities of a point source of water pollution and obtain samples of wastewater streams prior to their final treatment.*

*The Petition also presents a question of the sufficiency of the affidavits submitted in support of the application for an administrative search warrant in this case. We do not believe this issue is properly before this Court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 716 F.2d 1187. The final order and judgment of the district court (Pet. App. 9a-13a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 1983. A petition for rehearing was denied on November 8, 1983 (Pet. App. 14a). The petition for a writ of certiorari was filed on February 6, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 308 of the Clean Water Act, 33 U.S.C. 1318, provides in pertinent part:

> (a) Whenever required to carry out the objective of this chapter, including but not limited to (1) developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance under this chapter; (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance; (3) any requirement established under this section; or (4) carrying out sections 1315, 1321, 1342, 1344 (relating to State permit programs), and 1364 of this title—
>
> (A) The Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require; and
>
> (B) The Administrator or his authorized representative, upon presentation of his credentials—
>
> (i) shall have a right of entry to, upon or through any premises in which an effluent source is located or in which any records required to be maintained under clause (A) of this subsection are located, and

(ii) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under Clause (A), and sample any effluents which the owner or operator of such source is required to sample under such clause.

STATEMENT

1. Petitioner operates a petroleum refinery near Joliet, Illinois. In the course of normal plant operations, the facility discharges wastewater into a navigable river. Pursuant to Section 402 of the Clean Water Act, 33 U.S.C. 1342, the Illinois Environmental Protection Agency issued a National Pollutant Discharge Elimination System (NPDES) permit authorizing petitioner to make such discharges subject to the restrictions set forth in, or incorporated into, the permit (Pet. App. 15a-40a). Among other things, the permit requires petitioner to conduct periodic sampling of its various wastewater streams "at a point representative of [the] discharge" but "prior to mixing with other effluent streams" or "prior to its combination with the process water" and to forward the results to both the United States Environmental Protection Agency (EPA) and the State agency (Pet. App. 18a-26a).

On April 28, 1982, Basim J. Dihu, an EPA environmental engineer, attempted to conduct an inspection of petitioner's Joliet facility. Dihu was admitted to the premises and permitted to take samples of the process treatment plant and non-contact cooling water, as well as storm water discharge. Petitioner refused, however, to permit Dihu to sample internal waste streams before the point at which they reach an aeration basin or a treated water guard basin. Permission to obtain samples of sludge before heat treatment was similarly refused. Pet. App. 2a, 46a-47a.

2. On August 27, 1982, EPA applied to the district court for an administrative warrant "to enter, inspect and photograph the premises and to take samples of sludge and liquid

influents and effluents at the Mobil Oil Company facility * * * on three separate days within a ten-day period in accordance with Section 308 of the Clean Water Act" (Pet. App. 42a). The warrant application was supported by an affidavit executed by Dihu recounting petitioner's refusal to allow him to take the requested samples (Pet. App. 46a-47a). The warrant application was also supported by the affidavit of Jonathan Barney, an EPA chemical engineer (Pet. App. 43a-45a). Barney's affidavit stated that petitioner's facility had been selected for inspection pursuant to "an ongoing administrative program to monitor facilities that have some potential for the discharge of toxic pollutants" (Pet. App. 45a). Such extended compliance sampling inspection for toxicants (known as CSI-Ts) is intended to check for compliance with existing permit requirements and to determine whether toxic pollutants are being discharged that are not subject to permit limitations, but which should be regulated in future permits (*id.* at 43a). Barney further explained that, for a complex plant such as petitioner's facility, samples must often be collected from selected process waste streams within a plant, as well as from the final effluent, in order to achieve the most accurate measurements possible, to assess the adequacy of existing treatment methods, and to eludicate the nature of the sludge resulting from treatment (*id.* at 44a). The Barney affidavit described the specific locations at which EPA desired to take samples, concluding that "[a]nalysis of these samples is necessary to enable the U.S. EPA accurately [to] assess compliance and develop any necessary new permit limits for this Mobil Oil facility" (*id.* at 45a).

The United States Magistrate granted the warrant application and issued the inspection warrant on August 27, 1982. The warrant authorized inspector Dihu to (Pet. App. 49a-50a):

1. Ent[er] * * * upon or through the above described premises including all buildings, structures, equipment, machines, devices, materials and sites to inspect, sample, monitor and investigate the said premises.

2. Sample and seize combined effluent from the east and west clarifiers of the activated sludge treatment system.

3. Sample and seize sludge prior to the heat treatment system.

4. Sample and seize influent to the east and west aeration basins to the activated sludge treatment system (combined raw waste following east equalization basin).

5. Sample and seize any and all final effluent(s).

6. Take such photographs of the above authorized procedures as they may be required or necessary.

EPA commenced execution of the warrant and taking of samples. Petitioner filed a motion to quash the warrant, but the motion was denied by the magistrate. Thereafter, EPA completed execution of the warrant.

3. Petitioner commenced this action on September 2, 1982. Petitioner's complaint alleged, inter alia, that "[t]he Clean Water Act does not authorize U.S. EPA to inspect, sample or monitor MOBIL'S internal waste streams at points other than the NPDES point source discharge" (C.A. App. 5) and that the warrant exceeded the scope of EPA's statutory powers. Petitioner sought an injunction directing the EPA to return "all samples taken, findings, test results and any other data, records or documents" resulting from the completed inspection and barring EPA "from at any time inspecting, sampling or monitoring

MOBIL'S internal waste streams at points other than the NPDES point source discharge" (C.A. App. 6-7).

Petitioner's action was consolidated with an appeal taken by petitioner from the magistrate's order denying its motion to quash the warrant. The district court entered an interlocutory order restraining EPA from disclosing or using the contested samples or any information derived from them pending a final decision. After considering the case on the merits, the district court entered a final order dissolving the preliminary injunction, denying injunctive relief, and dismissing the complaint (Pet. App. 9a-13a).[1]

4. The court of appeals affirmed (Pet. App. 1a-8a). The court held that Section 308(a) of the Clean Water Act authorizes EPA to sample the wastewaters of a point source at any location within the facility, including wastewaters prior to treatment or partially treated effluents. The court observed that Section 308(a)(1) indicates that one of the primary purposes of Section 308 was to give EPA access to information useful in " 'developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance' " (Pet. App. 5a, quoting Section 308(a)(1)). To achieve the statutory goal of setting rational effluent limitations, "information is necessary to determine how efficiently the permittee is treating the water, which obviously requires a sample of water both before and after treatment" (Pet. App. 5a). The court also noted that EPA can more accurately assess samples of the final treated

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[1] The court of appeals entered an interim injunction prohibiting EPA from using, transmitting or releasing any of the samples obtained pursuant to the warrant or information derived from those samples during the pendency of the appeal. The stay order also barred EPA from "inspecting, sampling or monitoring Mobil's waste streams at points other than those described in the National Pollutant Discharge Elimination System Permit pending disposition of this appeal."

effluents "if it knows the level of pollutants in that waste water before it has been treated" (Pet. App. 6a).[2]

ARGUMENT

Petitioner's primary submission (Pet. 12-21) is that the affidavits that EPA submitted in support of its application for an administrative warrant did not meet the standards articulated by this Court in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978), and *Camara* v. *Municipal Court*, 387 U.S. 523 (1967). This issue was not raised in the court of appeals and accordingly is not properly presented here. In any event, the affidavits in question satisfy the standards delineated in *Barlow's* and *Camara*. In addition, petitioner contends (Pet. 21-27) that, in the circumstances of this case, Section 308 of the Clean Water Act affords EPA no authority to obtain samples of its wastewater before it has been fully treated. The court of appeals correctly rejected this contention.

1. In *Camara* v. *Municipal Court*, this Court held that, outside of certain carefully defined classes of cases, a warrantless non-consensual search of private property is unreasonable even though not undertaken to uncover evidence of crime. At the same time, however, the Court held that, in the context of such civil administrative searches, a warrant need not rest upon a showing of probable cause to believe that a violation is occurring in the location to be inspected. 387 U.S. at 534. Rather, a warrant may issue where the applicant has shown that its request to search private property is justified by reasonable governmental

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[2]The court of appeals denied petitioner's motion to stay issuance of its mandate pending certiorari. Thereafter, on November 23, 1983, Justice Stevens denied petitioner's application to stay issuance of the court of appeals' mandate and to bar EPA from employing the samples it had obtained or conducting further sampling pending dispostion of this petition.

interests. "[R]easonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." *Id.* at 539. In the companion case of *See* v. *City of Seattle*, 387 U.S. 541 (1967), the Court held that the general requirement of obtaining a warrant for searches applies in the context of commercial buildings as well as private residences.[3]

In *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978), this Court reaffirmed that the Fourth Amendment ordinarily requires authorities to obtain a warrant prior to conducting an administrative search of a commercial establishment. Again, however, the Court emphasized that the government need not show that a specific violation is likely taking place in a particular establishment. "Probable cause in the criminal law sense is not required" (*id.* at 320). Rather, a warrant may issue upon a "showing that a specific business has been chosen for a * * * search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources" (*id.* at 321). The Court explained: such "[a] warrant * * * would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria. Also, a warrant would then and there advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed" (436 U.S. at 323 (footnotes omitted)).

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[3]In *See*, this Court left open the question of whether "business premises may not reasonably be inspected in many more situations than private homes * * *." 387 U.S. at 546. Recently, in *Donovan* v. *Dewey*, 452 U.S. 594, 598-599 (1981), this Court stated that "the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home" and recognized that, in certain commercial circumstances, this expectation may be so limited as to justify warrantless searches.

b. Petitioner asserts that the affidavits that EPA submitted in support of its warrant application did not satisfy the foregoing standard and complains that "the Seventh Circuit did not examine EPA's action in light of the standards set forth in *Barlow's*" (Pet. 13.) The court of appeals' failure to advert to *Barlow's* or *Camara*, or to address the adequacy of EPA's affidavits, however, affords no basis for complaint in this Court for petitioner simply did not contend on appeal that those affidavits were in any way deficient.[4] Because petitioner failed to raise its primary contention in the court of appeals and the court of appeals' opinion reflects no ruling on that point, the issue is not properly before this Court. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

c. Even if it had been properly presented, the question of the sufficiency of EPA's affidavits merits no further review, for the affidavits satisfied the *Barlow's* and *Camara* standards. The affidavit of Jonathan Barney (Pet. App. 43a-45a)

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[4]Contrary to petitioner's suggestion (Pet. 13) the court of appeals did not "use[] its own 'interest-balancing' analysis to determine whether Mobil had any Fourth Amendment rights * * * worthy of protection and whether EPA's regulatory interest out-weighed Mobil's privacy interest". The court of appeals confined its opinion to the question whether Section 308 of the Clean Water Act authorized EPA to obtain the samples at issue. The court's language quoted at pages 13-14 of the petition clearly addresses this statutory argument and not any Fourth Amendment issue. In the court of appeals, petitioner argued only that the sampling conducted under the warrant was not authorized by Section 308 (Pet. C.A. Br. 7-35; Pet. C.A. Reply Br. 4-21). Petitioner did not challenge the sufficiency of EPA's affidavits, and did not cite *Camara* at all. *Barlow's* was cited only in connection with petitioner's argument that injunctive relief from the alleged statutory violation should be granted (Pet. C.A. Br. 37, 40; Pet. C.A. Reply Br. 22). Petitioner invoked the Fourth Amendment only in asserting that, because ultra vires, the challenged inspection was an unreasonable intrusion upon its protected privacy interests (see Pet. C.A. Reply Br. 22 & n.17). Nor did petitioner's rehearing petition present the contention now made in this Court.

explained that petitioner's facility had been selected for inspection as part of an ongoing EPA program to monitor facilities having some potential for discharge of toxic pollutants. The purposes and operations of that program were also described. Barney's affidavit also explained why EPA believed that the challenged sampling procedures were necessary and it precisely identified the samples that EPA sought. In the proceedings below petitioner did not challenge the accuracy of any of the facts in the affidavits.[5] The warrant was carefully limited both in scope and duration. See pages 3-5, *supra*. Petitioner, moreover, has not demonstrated that it was subject to discriminatory treatment or deliberate harassment; nor has it shown that the sampling authorized constituted any more than the most minimal of intrusions upon its normal operations.[6] Under these circumstances, the warrant was clearly valid.

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[5]Petitioner now attempts to do so for the first time in this Court (Pet. 16-17) relying on materials reproduced at pages 51a-94a of its appendix. None of these materials are part of the record below; they were not considered by the courts below. Nor has petitioner demonstrated that they could not have been timely obtained with due diligence. Petitioner's effort to retry its case in this Court is impermissible. In any event, a close reading of the materials cited by petitioner discloses that they do not support its claims. For example, petitioner asserts (Pet. 17) that EPA policy requires a "lengthy" affidavit when EPA seeks information from a source and refers to certain documents in the appendix to support this conclusion. The cited materials, however (even assuming that they establish a binding agency policy), nowhere require a "lengthy" affidavit. Rather they indicate that the affidavit should fully describe the agency program involved and explain why the particular facility in question was selected for inspection (Pet. App. 57a). As indicated above, the Barney affidavit meets this standard. The fact that a different EPA employee may have submitted a lengthier affidavit when seeking to inspect a different facility in a different industry for different purposes (See Pet. App. 77a-85a) does not establish that EPA's affidavit here was inadequate. Petitioners' other assertions are similarly flawed.

[6]Petitioner has not claimed that EPA's sampling threatens to compromise any trade secret. Section 308(b)(2) of the Clean Water Act, 33 U.S.C. 1318(b)(2), provides a special mechanism whereby an owner or

2. Section 308(a)(A)(iv) of the Clean Water Act, 33 U.S.C. 1318(a)(A)(iv), provides that the Administrator shall require the owner or operator of a point source to "sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe)." Section 308(a)(B)(ii), 33 U.S.C. 1318(a)(B)(ii), in turn, authorizes the Administrator or his authorized representative to sample "any effluents" which the owner or operator is required to sample under the prior clause. Petitioner asserts (Pet. 21-27) that Section 308 does not authorize EPA to secure samples of its untreated or partially treated wastewaters. The courts below correctly rejected this contention. In any event, the decision below does not — and is not asserted to — conflict with any decision of this Court or of any court of appeals and warrants no further review.

Petitioner initially asserts (Pet. 21-22) that the wastewaters coming out of its various production facilities do not become "effluents" within the meaning of Section 308 until after they have been fully treated and are ready for discharge into navigable waters. Petitioner fails to advance any creditable argument in support of this assertion. As petitioner acknowledges (Pet. 21), the term "effluent" is not defined by the Act. When a term is not defined in a statute itself, the courts will, whenever possible, assign the word a meaning that is consistent with the ordinary meaning of the term, which effectuates the purposes for which the statute was enacted, and which does not render other provisions of the statute meaningless. *American Textile Mfrs. Inst., Inc.* v. *Donovan*, 452 U.S. 490, 513 (1981); *United States* v. *Oregon*, 366 U.S. 643, 648 (1961). EPA's interpretation of "effluent" is the only one which meets all of these standards.

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operator who supplies information pursuant to Section 308 may seek to have the information held confidential. Petitioner has not attempted to invoke this provision.

The conventional meaning of "effluent" is "something that flows out." [7] Accordingly, EPA has sensibly understood "effluent" to include those wastewaters that flow out of production facilities. Moreover, EPA's interpretation effectuates the purposes of the Clean Water Act. For example, pursuant to Sections 301 and 304, 33 U.S.C. 1311 and 1314, EPA must establish, periodically review and, if appropriate, revise, effluent limitations that require the application of the best available technology economically achievable (BAT) for a given category or class of discharges. See *EPA* v. *National Crushed Stone Ass'n*, 449 U.S. 64, 69-72 (1980).[8] This task requires that the agency be thoroughly familiar with all facets of wastewater treatment technology and economics. The ability to take samples at a variety of locations in the course of a pollution treatment process significantly enhances EPA's ability to establish and maintain rational effluent limitations.[9] Finally,

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[7] *Webster's New Collegiate Dictionary* 363 (1977).

[8] Section 301(d), 33 U.S.C. 1311(d). The statutory duty periodically to review and revise effluent limitations belies petitioner's suggestion (Pet. 25-27) that because effluent limitations for petitioner's facility have already been initially established, EPA could have no possible use for any data derived from the sampling here.

[9] As the court of appeals observed (Pet. App. 5a) Section 308 was expressly designed to provide the EPA Administrator with a means of obtaining information needed for "developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance (§ 308(a)(1), 33 U.S.C. 1318(a)(1)). The legislative history of the Clean Water Act confirms that EPA's inspection and sampling authority is to be construed broadly. Thus, in explaining the need for Section 308, Congress specifically pointed out the agency's "difficulty in obtaining reliable cost and waste loading information to set effluent limits and to enforce effective pollution control." H.R.Rep. 92-911, 92d Cong., 2d Sess. 113-114 (1972). Indeed, unless EPA can secure this kind of data, it may be vulnerable to challenges to the validity of its effluent limitations in which it is argued that the limitations do not reflect consideration of all pertinent data. See *National Lime Ass'n* v. *EPA*, 627 F.2d 416, 442-443 (D.C. Cir. 1980).

petitioner's suggestion (Pet. 22) that the term "effluent" encompasses only wastewaters at the point of their discharge into navigable waters renders several other provisions of the Act meaningless. For example, Section 308 expressly provides for inspections, monitoring and sampling to assist in development of "pretreatment standards" pursuant to Section 307 of the Act, 33 U.S.C. 1317, which applies to discharges to publicly-owned treatment works. Petitioner's restrictive interpretation of the term "effluent" would render these provisions inoperative. See also Section 402(b)(8) of the Act, 33 U.S.C. 1342(b)(8).

Petitioner also argues (Pet. 23-24) that Section 308 limits the Administrator to sampling those effluents that the point source itself has been required to sample. Assuming that petitioner's premise is correct, petitioner still cannot prevail here. As petitioner admits (Pet. 24), it is required by the terms of its permit to take samples of its effluents. Pursuant to the warrant, EPA obtained samples of those same effluents, only at locations different from those at which petitioner performs its own sampling. Nothing in Section 308, however, confines EPA's authority to sample effluents to the particular locations at which the owner or operator performs sampling to meet the requirements of its NPDES permit.[10]

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[10]The court of appeals properly rejected (Pet. App. 4a-7a) petitioner's claim that sampling of a given waste stream at two locations in the course of treatment constitutes sampling of two different effluents for purposes of Section 308.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONER

Mobil is seeking a writ of certiorari to have this Court reverse a plainly erroneous decision by the Seventh Circuit which would allow the Environmental Protection Agency (hereinafter "EPA" or "the Agency") to intrude upon the private property of thousands of persons in contravention of the Fourth Amendment and in excess of EPA's statutory authority. Mobil's petition demonstrated that, in obtaining a warrant to sample internal wastewater streams within Mobil's refinery, EPA failed to satisfy the requirements for probable cause enunciated by this Court in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). In its response, the Government has not shown that EPA established probable cause. Instead, the Gov-

ernment has simply asserted that EPA's affidavits met the *Barlow's* standards and suggested that because Mobil was not subjected to "deliberate harassment" or more than "minimal . . . intrusions upon its normal operations," it has nothing to complain about. In the alternative, the Government has asked for denial of Mobil's Fourth Amendment claim because of an alleged failure to preserve the issue before the court of appeals. But nothing the Government suggests in any way mitigates the plain error committed by the courts below or vitiates the appropriateness of the Court granting certiorari to review this important constitutional issue.

Mobil's petition also demonstrated that EPA had no authority under section 308 of the Clean Water Act [1] to seize samples of Mobil's internal wastewater streams. In response, the Government has avoided any discussion of the specific points raised by Mobil. Rather, the Government has cited a standard rule of statutory construction but has misapplied it to the statute at issue and the facts of this case. Given EPA's intent to construe broadly the Seventh Circuit's interpretation of section 308 and apply it to industrial facilities across the nation, the erroneous decision below presents an issue of statutory construction of substantial federal importance that should be addressed by the Court.

THE GOVERNMENT HAS FAILED TO DEMONSTRATE THAT EPA'S ACTIONS MET THE MINIMAL REQUIREMENTS OF *BARLOW'S*

In its petition, Mobil demonstrated that EPA's request for a warrant failed to describe an administrative inspection plan based on neutral criteria and failed to explain why Mobil's refinery satisfied the criteria of such a plan—the minimal requirements imposed by *Barlow's*. (Pet. 15). The Government's response never attempts to

[1] The Federal Water Pollution Control Act, as amended, (commonly known as the Clean Water Act), 33 U.S.C. § 1318 (1982).

explain how those two requirements of *Barlow's* have been satisfied.

The Government claims that the affidavits submitted by EPA in support of its request for a warrant described "an ongoing EPA program to monitor facilities having some potential for discharge of toxic pollutants." (Opp. 10). But this statement is no less conclusory than the one found constitutionally defective in *Barlow's*, where the Secretary of Labor had alleged that "the desired inspection and investigation are contemplated as a part of an inspection program designed to assure compliance with the Act."[2] As in *Barlow's*, a search directed at "facilities having some potential for discharge of toxic pollutants" is not circumscribed by any meaningful and specific neutral criteria. There are 125 toxic pollutants regulated by the Clean Water Act.[3] Virtually every source in every source category regulated by the Clean Water Act has "some potential" for discharging one or more of these toxic pollutants. Yet EPA in its affidavits did not explain which of the 125 toxic pollutants were being monitored by the program, which of the 34 industrial point source categories[4] regulated by the Agency were being given priority for inspection, or how particular sources, such as Mobil's refinery, were selected from within a point source category.

The Government attempts to mitigate the thoroughly conclusory nature of EPA's affidavits by alluding to EPA's claim of a need for samples of Mobil's internal wastewater streams, and by asserting that the search at issue was of limited scope and duration. Such a bare claim of necessity is always the excuse of an overreaching

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[2] *Barlow's*, 436 U.S. at 323 n. 20.

[3] 33 U.S.C. § 1317(a)(1) (1982); 40 C.F.R. Part 122, Appendix D, Tables II and III (1983).

[4] 40 C.F.R. Part 122, Appendix A (1983).

administrative agency. As *Barlow's* makes evident, however, that claim can only be tested, and arbitrariness prevented, by an agency's disclosure of the neutral, statutorily based criteria guiding the inspection and by an explanation of how the object of the inspection fits those criteria. Moreover, a specifically limited search is no substitute for satisfying these two threshold requirements of *Barlow's*.[5] Rather, a limitation on scope and duration is merely a third constitutional requirement not at issue in this case.[6]

Finally, the Government observes that Mobil has not demonstrated discriminatory treatment, deliberate harassment, or significant intrusion upon its normal operations. (Opp. 10). In effect, the Government contends, without citation, that the Fourth Amendment requires the party whose private property has been invaded to carry the burden of demonstrating deliberate government harassment and the substantial nature of the government's intrusion. This stands the Constitution on its head. It is indisputable that, before a search warrant may issue, it is the Government which must shoulder the burden of demonstrating probable cause to intrude upon the private property of an individual or commercial establishment.[7] If the Government fails to sustain its burden, as is manifestly the case here, a person or commercial establishment has an absolute right of privacy without having to

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[5] Mobil does not concede that the scope of the search was reasonably limited.

[6] *See Barlow's*, 436 U.S. at 323 n. 21. In any event, the limits on the scope and duration of a search must be rationally related to the purposes and neutral criteria of the administrative plan and can, therefore, be appropriately determined by the magistrate only after the plan has been fully described. Since EPA has never enumerated the specific neutral criteria underlying its inspection program, the reasonableness of the warrant's limitations on scope and duration is not yet ripe for consideration.

[7] *Barlow's*, 436 U.S. at 320.

make some further showing about the motive or effect of the Government's intrusion.

This is all the Government offers to justify EPA's intrusion into Mobil's property. Plainly, the Government has failed to show that EPA satisfied its burden of showing probable cause in this case. This Court should not condone the Government's evident attempt to dilute so substantially the protection of the Fourth Amendment.

The Government's other argument with regard to the Fourth Amendment violation is that, as a procedural matter, it is not properly before this Court because Mobil failed to raise it before the Seventh Circuit. (Opp. 9). This assertion is simply incorrect. Mobil raised and argued the constitutional issue in the district court,[8] and in the Seventh Circuit (Pet. C.A. Br. 37, Pet. C.A. Reply Br. 22).[9] That the Seventh Circuit failed to address this substantial and obvious constitutional issue, but chose only to discuss the issue of statutory construction, should not bar this Court from hearing and deciding Mobil's constitutional claim.

Moreover, even assuming *arguendo* that the issue was not raised in the court of appeals,[10] this Court should nevertheless grant certiorari to review Mobil's constitutional claim. This Court has always recognized the inapplicability of the rule stated in *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970), when consideration of an issue is necessary to correct a "plain error" committed by a federal court below. *Washington v. Davis*, 426 U.S. 229, 238 n.9 (1976); *Silber v. United States*, 370 U.S. 717, 718 (1962). This is emphatically true when the error "was on a vital phase of the case and

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[8] Pet. 7.

[9] Pet. 8-9.

[10] The Government does not dispute that the constitutional claim was raised, argued, and ruled upon in the district court.

affected the substantial rights of the defendants." *United Brotherhood of Carpenters v. United States*, 330 U.S. 395, 412 (1947). As demonstrated in Mobil's petition for certiorari, EPA's affidavits plainly failed to meet the minimal requirements of *Barlow's*.[11] Nothing said in the Government's response has explained this manifest failure. Unquestionably, the plain error committed by the Seventh Circuit infringes upon Mobil's substantial, constitutional right to be free of unreasonable searches and seizures. This Court should, therefore, grant Mobil's petition in order to correct that plain error.

THE SEVENTH CIRCUIT'S ERRONEOUS INTERPRETATION OF SECTION 308 PRESENTS AN ISSUE OF SUBSTANTIAL FEDERAL IMPORTANCE

In support of its request that this Court review the Seventh Circuit's erroneous interpretation of section 308 of the Clean Water Act, Mobil demonstrated that the scope of EPA's sampling authority under that provision presented a question of first impression and substantial federal importance to the enforcement of the nation's environmental laws (Pet. 18, 21), and noted that EPA intended to rely upon the Seventh Circuit's broad interpretation of section 308 as a license to undertake a broad program of internal sampling at numerous facilities subject to the Clean Water Act. (Pet. 18).

In its opposition the Government does not dispute the importance of this statutory question. Nor does the Government disavow EPA's intention to apply the Seventh Circuit's interpretation on a nationwide basis. Instead, the Government claims the absence of a conflict among the circuits in support of its view that the Court should decline to address the scope of section 308. Without any reasoned analysis, the Government also maintains that the Seventh Circuit's construction of section 308 was correct. (Opp. 11).

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[11] Pet. 14-18.

The Government's observation regarding the absence of conflicting decisions misses the point. The existence of such a conflict is not a prerequisite to review by this Court. *See* Sup. Ct. R. 17.1(c). It is sufficient if the case presents a question of substantial federal importance.[12] This is just such a case. Given the pervasiveness of the Clean Water Act and other environmental laws granting EPA authority similiar to that conferred by section 308, the scope of EPA's inspection and sampling authority under that provision is of great concern to a broad range of industrial facilities. (Pet. 18-21). The *amicus curiae* brief filed by the American Petroleum Institute in support of Mobil's petition attests to the vital interests of American industry in this Court's ruling on the scope of EPA's authority under section 308.

The interpretation of section 308 proffered by the Government in its opposition further highlights the need for review by this Court. The Government proposes a reading of the statute that narrowly focuses upon what it alleges to be the "ordinary" meaning of the statutory term "effluent". (Opp. 11-12). In order to derive the "ordinary" meaning of this term, the Government relies exclusively upon a seven-year-old dictionary reference that defines "effluent" as "something that flows out" without indicating from where it flows. (Opp. 12).[13]

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[12] Indeed, the Government itself has recently sought certiorari in a case involving the Clean Water Act in which there is no conflict among the circuits. United States Environmental Protec ion Agency v. Natural Resources Defense Council, *petition for cert. filed*, 52 U.S.L.W. 3652 (U.S. March 6, 1984) (No. 83-1373).

[13] The Government's myopic focus upon the dictionary definition of "effluent" runs afoul of Judge Learned Hand's admonition recently cited by this Court in Watt v. Alaska, 451 U.S. 259, 266 n. 9 (1981):

> [I]t is one of the surest indexes (sic) of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative

The Government's failure to consider or more than fleetingly mention the surrounding statutory context in which Congress used the term "effluent" underscores the superficiality of its analysis. The meaning of an undefined technical term in a complex statute can be discerned only by viewing it in the statutory context in which it is used. *See Watt v. Western Nuclear, Inc.*, 103 S. Ct. 2218, 2223-24 (1983); *Metropolitan Edison Company v. People Against Nuclear Energy*, 51 U.S.L.W. 4371, 4373 (U.S. April 19, 1983); *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 73-75 (1980); *E.I. DuPont de Nemours & Co. v. Train*, 430 U.S. 112, 126-28 (1977). In the context of the Clean Water Act, Congress' definition of similar terms such as "effluent limitation" and "discharge of a pollutant" provides convincing evidence that "effluent" should not be construed to include internal wastewater streams prior to discharge into navigable waters. (Pet. 22).

The Government's bland assertion that its interpretation of the "ordinary" meaning of the term "effluent" to include internal wastewater streams effectuates the purposes of the Clean Water Act simply ignores the statute's express limitation on EPA's authority. Contrary to the Government's suggestion, Congress did not unconditionally grant EPA the authority to sample wastewater streams at any point in the treatment process. Instead, as Mobil has demonstrated, Congress expressly limited EPA's sampling authority only to those effluents "the owner or operator is required to sample", 33 U.S.C. § 1318(a)(B)(ii) (1982). (Pet. 23). EPA has never promulgated a rule requiring petroleum refineries to conduct internal wastewater stream sampling. Nor does Mobil's NPDES permit require it to perform such sampling. In the absence of any obligation upon Mobil to

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discovery is the surest guide to their meaning (quoting Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945)).

sample its internal wastewater streams, the statute plainly does not authorize EPA to engage in such sampling. (Pet. 23-24).

While petitioner could elaborate on the reasons why the Government's arguments are meritless, the Government's analysis is so superficial that petitioner sees no need to repeat what has already been said in its petition. Indeed, it is clear that the Government has no sound arguments to support the Seventh Circuit's holding on the extent of EPA's authority under section 308.

CONCLUSION

For the reasons set forth above and in the petition itself, the petition for a writ of certiorari to review the opinion of the United States Court of Appeals for the Seventh Circuit entered in this case should be granted.

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No. 83-1290

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MOBIL OIL CORPORATION,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and VALDUS ADAMKUS, REGIONAL ADMINISTRATOR, REGION V, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE AMERICAN PETROLEUM INSTITUTE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN PETROLEUM INSTITUTE

The American Petroleum Institute submits this brief as *amicus curiae* in support of the petition for a writ of certiorari in Number 83-1290.[1] The petition seeks review of the opinion of the United States Court of Appeals for the Seventh Circuit that the Environmental Protection Agency ("EPA") had the authority under Section 308 of the Clean Water Act, 33 U.S.C. § 1318 (1976 & Supp. V. 1981), to collect samples from the internal waste water streams at

[1]Both parties have consented in writing to the filing of this brief. Copies of the letters from counsel have been lodged with the Clerk.

the petitioner's petroleum refinery near Joliet, Illinois. *Amicus* believes that the Seventh Circuit misconstrued EPA's statutory authority under the Act and that the non-consensual collection of samples from petitioner's private property violated its constitutionally protected right to be free from unreasonable searches and seizures. In an era of pervasive governmental regulation of commercial enterprise, the question of what constitutional limits circumscribe the government's authority to enter upon private property gains added significance and, therefore, is deserving of plenary review by this Court.

INTEREST OF THE AMICUS CURIAE

The American Petroleum Institute ("API") is a national trade association with a membership of over 200 corporations and 6,000 individuals who are engaged in all aspects of the petroleum industry. Specifically, forty of API's member companies own or operate petroleum refineries and, therefore, are particularly interested in the outcome of this case. API regularly represents the petroleum industry in administrative rulemaking proceedings in the various state and federal agencies and in litigation in the state and federal courts. API shares the concern of petitioner, one of its members, that a fair and constitutionally supportable balance be struck between legitimate governmental regulation of industry and the integrity of private property.

ARGUMENT

This case involves a modern petroleum refinery located near Joliet, Illinois, owned and operated by the Mobil Oil Corporation. Waste waters discharged from the refinery are subject to federal and state regulation under the Clean

Water Act. The plant operates under a valid National Pollutant Discharge Elimination System (NPDES) permit issued by the State of Illinois. Mobil has willingly monitored its waste water discharges and has unhesitatingly permitted government inspectors to do the same. In 1982, for the first time, EPA sought, over Mobil's objection, to collect samples of the Joliet refinery's internal waste streams (i.e., waste waters that had not yet been treated in the plant's waste water treatment system). Armed with an inspection warrant which had been issued based upon two vague affidavits, EPA collected the samples it desired. In the courts below Mobil unsuccessfully challenged this involuntary inspection on the grounds that it exceeded EPA's statutory authority and that it constituted an unreasonable search and seizure under the Fourth Amendnent to the United States Constitution. In rejecting Mobil's contentions, the Seventh Circuit Court of Appeals glossed over Mobil's statutory arguments and employed a novel balancing test by determining that EPA's interest in collecting the samples outweighed Mobil's interest in preventing their collection.

1. ***The Seventh Circuit ignored established rules of statutory construction, and as a result, misconstrued an important federal statute which has applicability to virtually all American industry.***

The Seventh Circuit's ruling effectively removes the limitations in the Clean Water Act on the government's authority to intrude into commercial private property. In doing so, that court upset the balance struck by Congress between the legitimate public interest in pollution control and private property rights.

In determining the extent of EPA's authority to sample industrial waste water streams, one should look first to the

plain meaning of the applicable statute. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *see EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 73-74 (1980). The applicable statute here, Section 308(a) of the Clean Water Act, authorizes EPA to "sample any effluents which the owner or operator . . . is required to sample . . . ." In granting EPA authority to engage in sampling, Congress imposed express statutory limitations on the exercise of that authority: (1) only sampling of "effluents" is allowed; and (2) such sampling is allowed only to the extent that the owner or operator is required to sample the same effluents. Both these limitations were effectively ignored by the courts below.

The first statutory limitation requires one to consider whether internal waste streams constitute "effluents" within the intendment of Section 308. Although the term "effluents" is not defined in the Act, a definition may be constructed by using other, defined terms.[2] Indeed, in

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[2]Section 502(11) provides:

> The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

33 U.S.C. § 1362(11) (1976).

Section 502(14) provides:

> The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture.

33 U.S.C. § 1362(14) (Supp. V. 1981).

order to harmonize the term "effluents" with the statutorily defined terms "effluent limitations," "point source," and "discharge of a pollutant," it is necessary to consider "effluents" as materials discharged from a discrete and confined conveyance into the navigable waters of the United States. Since only treated waste waters are discharged, untreated internal waste streams are not "effluents" as that term is used in the Act. Thus, Section 308(a) is inapposite to the sampling at issue here.

Even if the term "effluents" could be read so broadly as to encompass internal streams (a reading *amicus* believes is unsupportable on its face or by resort to legislative history), EPA may only sample those effluents that the plant owner or operator is required to sample. Neither the Act, nor EPA's regulations,[3] nor the terms of the Illinois NPDES program, nor Mobil's NPDES permit require Mobil to sample internal waste streams. Indeed, the Joliet refinery's permit calls for sampling only "at a point representative of discharge."[4] There being no requirement for

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Section 502(12) provides:

> The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

33 U.S.C. § 1362(12) (1976).

[3]EPA's regulations promulgated pursuant to Section 308(a) are found at 40 C.F.R., §§ 122.44(i), 122.45(i) (1983). The regulations call for monitoring of internal streams only in exceptional circumstances, not here applicable.

[4]EPA requested and obtained Mobil's permission to sample such discharge "effluents." This sampling is not and has not been at issue in these proceedings.

Mobil to sample its internal waste streams, EPA has no authority under Section 308 to sample these streams.

If one looks beyond the face of the statute to the legislative history, it becomes even clearer that Congress intended to restrict the government's sampling of industrial waste waters. While it is true that Congress demonstrated a desire that EPA be able to obtain sufficient information in order to carry out its mandate,[5] it is also true that Congress intended to limit the monitoring allowed to that which is necessary for the control of the discharge of pollutants.[6] Congress specifically declined to authorize the gathering of data per se.

Even if the above-cited express limitations on when EPA can engage in sampling could be ignored, the agency still would be required to articulate a basis for undertaking

[5]H.R. Rep. No. 911, 92nd Cong., 2d Sess. 113 (1972), *reprinted in* 1 The Environmental Policy Division of the Congressional Research Service of the Libarary of Congress, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 800 (1973).

[6]In its analysis of the legislation, the House Report stated:

> This section requires the owner or operator of any point source to monitor his own discharges accurately and to provide information to show whether or not he is in compliance with effluent limitations and other requirements under this Act.
>
> An indirect result of this requirement to provide valid data will be the expansion of EPA's and the States' data base for monitoring and planning. However, such monitoring is basically for control of the discharge of pollutants and not the gathering of data. The rights of the Administrator to inspect is limited to control of discharge of pollutants and not data gathering per se.

H.R. Rep. No. 911, 92nd Cong., 2d Sess. 114 (1972), *reprinted in* 1 The Environmental Policy Division of the Congressional Research Service of the Library of Congress, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 801 (1973).

its proposed actions. In its application for the inspection warrant at issue here, EPA cited two statutory purposes which would be advanced by granting its request: (1) it would allow EPA to determine permit compliance; and (2) it would enable EPA to determine whether additional pollutants should be limited in Mobil's next permit. Neither of these stated rationales, however, withstands analysis. First, EPA had previously found Mobil in compliance with the terms of its NPDES permit, without resort to the sampling of its untreated waste water.[7] Second, the development of additional effluent limitations for Mobil's permit was not a legitimate purpose. EPA must impose technology-based limitations by rule, *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 126-128 (1977), and not on a case-by-case basis, unless it retains the authority to issue NPDES permits, 33 U.S.C. §1342(a)(1) (1976). In this case, EPA had delegated the authority to issue NPDES permits to Illinois. Thus, EPA had no residual authority to impose additional limitations on the Joliet refinery.

As a federal regulatory agency, EPA can act only pursuant to its statutory authority. *Stark v. Wickard*, 321 U.S. 288, 309-310 (1944). Here, EPA exceeded its authority and, as a consequence, the sampling should never have been permitted. If allowed to stand, the Seventh Circuit's holding will allow EPA virtually limitless discretion in conducting inspections of plant sites. Thousands of industrial plants across the country may be affected. Beyond this, such a cavalier analysis of statutory authority may

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[7] In fact, Mobil's Joliet refinery has never been found to be in violation of any environmental law or regulation, and its wastewater treatment plant received an award from the State of Illinois for environmental excellence.

well be applied by the government to authorize inspections under provisions contained in other statutes administered by EPA,[8] as well as in any number of other federal regulatory statutes.

2. ***The decision of the Seventh Circuit improperly disregards the constitutional guidelines for administrative inspections set down by this Court in*** Barlow's ***and*** Camara.

The fundamental purpose of the Fourth Amendment's prohibition against unreasonable searches and seizures is "to safeguard the privacy and security of individuals against arbitrary invasions. . ." *Camara v. Municipal Court,* 387 U.S. 523, 528 (1967). The Fourth Amendment's protections apply to commercial as well as residential premises. *See v. City of Seattle,* 387 U.S. 541, 543 (1967). Except in "certain carefully defined classes of cases," warrantless searches or inspections are unreasonable and thus violative of the Fourth Amendment. *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 312-313 (1978).

Probable cause sufficient to support a warrant for an administrative inspection must be based either on "specific evidence of an existing violation," *Barlow's,* 436 U.S. at 320, or on a showing that " 'reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment.' " *Barlow's,* 436 U.S. at 320, quoting *Camara,* 387 U.S. at 538. An inspection warrant should not be a mere "rubber stamp" approval of executive action; rather, it should reflect the judgment of a neutral and detached magistrate that the proposed inspection is "reasonable under the con-

[8] *See* Resource Conservation and Recovery Act, 42 U.S.C. § 6927(a)(1) (Supp. V. 1981); Clean Air Act, 42 U.S.C. § 7414 (Supp. V 1981); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9604(e)(1)(B) (Supp. V 1981).

stitution, is authorized by statute, and *is pursuant to an administrative plan containing specific neutral criteria.*" *Barlow's,* 436 U.S. at 323. (emphasis added)

As discussed above, the inspection in this case was not authorized by statute. Even where warrantless administrative inspections have been upheld,[9] they were authorized by statute. Even the minimal Fourth Amendment protections in the form of statutory authorizations accorded to "pervasively regulated industries" were not afforded to the petitioner in this case. Thus, not only was the inspection *ultra vires,* but also it violated the Fourth Amendment. *See, Barlow's,* 436 U.S. at 323.

Even if the inspection here could fall within EPA's authority under section 308(a), the affidavits supporting the inspection warrant failed to meet the criteria for establishing probable cause set out in *Barlow's.* Although EPA acted pursuant to a warrant in this case, the warrant was so poorly supported that the difference between this case and cases where no warrants were obtained, *e.g., Barlow's, Camara,* and *See,* is one of form and not substance. If the warrants required in all but "certain carefully defined classes of cases," *Barlow's,* 436 U.S. at 312-313, are to have substance, then meaning must be given to this Court's requirement of "an administrative plan containing specific neutral criteria," *Barlow's,* 436 U.S. at 323.[10]

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[9] *See* Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) [industry had a long history of strict government regulation]; United States v. Biswell, 406 U.S. 311 (1972) [urgent governmental interests at stake; inspections were a crucial part of the regulatory scheme].

[10] There was no evidence that Mobil was suspected of a violation of law or regulation, so EPA officials sought to establish probable cause on the basis of an administrative plan.

This Court provided some guidance as to the meaning of this requirement in *Barlow's*. For one thing, a mere reference to the existence of an administrative plan in the supporting affidavit is insufficient. *Barlow's*, 436 U.S. at 323 n. 20. Nor is a mere statement that the proposed inspection is designed to assure compliance with a regulatory statute sufficient. *Barlow's*, 436 U.S. at 323 n. 20. The affidavit should: (1) demonstrate the criteria for selection of inspection sites contained within the plan; and (2) show how the site sought to be inspected fits within those criteria. *Barlow's*, 436 U.S. at 323 n. 20.

In the lower courts, an attempt has been made to give meaning to this requirement. In *Matter of Urick Property*, 472 F.Supp. 1193 (W.D. Pa. 1979), an administrative inspection warrant was sought based upon a supporting affidavit that described the development of two national inspection programs, stated that 300 foundries throughout the country had been selected for inspection, referred to a history of violations at the foundry in issue, and stated that the foundry in issue had not been inspected during the preceding year. Nonetheless, the court quashed the warrant because the government failed to articulate how that foundry differed from any number of other foundries. The First Circuit Court of Appeals applied a similarly exacting standard in *Donovan v. Wollaston Alloys, Inc.*, 695 F.2d 1 (1st Cir. 1982). There, the court upheld a warrant based on an affidavit that contained a five-page description of the administrative plan and an explanation that industries had been categorized by priority and that specific sites within the various categories were selected in alphabetical order.

In cases such as *Urick Property* and *Wollaston Alloys*, the rights of the industries involved were protected. Before warrants were issued, the government was required to pro-

vide sufficient detail about its inspection plans to warrant the conclusion that such plans really existed and that the sites sought to be inspected naturally fit within the plans' criteria. When the government meets such minimal requirements, plant owners are reassured that the inspections sought are not the product of arbitrary agency action. In the absence of the government's meeting such requirements, plant owners are in the same position they would be in if there were no warrant process at all.

Such was the case here. The affidavits submitted by EPA officials stated only that the proposed inspection was part of a "CSI-T" (Compliance Sampling Inspections for Toxicants) program; that the purposes of the program were to determine compliance with NPDES permits and to determine whether additional pollutants needed to be considered in future permits; and that the sampling of internal waste streams was necessary to achieve those purposes. As to the selection of Mobil's Joliet refinery for an inspection, the affidavits merely stated that the facility "was selected for a CSI-T as part of an ongoing administrative program to monitor facilities that have some potential for the discharge of toxic pollutants," and "pursuant to the continuing U.S. EPA program to monitor compliance with existing NPDES permit requirements." These alleged "programs" were described in no further detail. No information was provided about the scope of the programs, the planned frequency of inspections under the programs, or how particular sites were to be selected. No explanation was provided as to where Mobil's refinery might fit into EPA's list of priority plants, if any, *see Wollaston Alloys, supra,* or as to how Mobil's refinery differed from the thousands of other plants that operate under valid NPDES permits and that have "some potential for the discharge of toxic pollutants," *see Matter of Urick Property, supra.*

On the basis of such scant information, it would be impossible for a magistrate, the petitioner, or this Court, to be assured that petitioner's site was chosen for sampling on the basis of pre-established neutral criteria. The lower courts' refusal to quash the warrant permitted the magistrate to "rubber stamp" EPA's application, rather than carry out the task of substituting his independent judgment for that of agency officials.[11] The net effect was to make a mockery of the Fourth Amendment's warrant requirement. The issuance of a warrant on the basis of so little information as to make the warrant requirement meaningless is the very sort of arbitrary action against which the Fourth Amendment was designed to protect and which this Court has on so many prior occasions condemned.

Yet arbitrary action is not the only danger attached to warrants based on such vague information. *Amicus* reiterates that petitioner's refinery was a modern facility with an excellent environmental compliance record. At no place in the record is there even a suggestion that petitioner was suspected of violating the law. However, the ramifications of "rubber stamp" warrants at issue here could extend to other situations as well. For example, if the owners of a particular plant are suspected of criminal violations, the government could employ vaguely described "administrative plans" as a subterfuge for conducting what is truly a prosecutorial search.[12] Although most federal regulatory statutes are enforced through civil proceedings, nearly all contain criminal penalties for willful violations.[13] Thus, the potential for abusing the warrant

[11] *See* United States v. Martinez-Fuerte, 428 U.S. 543, 566 (1976).

[12] "'[I]f the authorities are seeking evidence to be used in a criminal prosecution, the usual standard [of probable cause] will apply.'" Michigan v. Tyler, 436 U.S. 499, 508 (1978), *quoting with approval the same case below*, 399 Mich. 564, 584 (1977).

[13] Including the CWA. 33 U.S.C. § 1319 (1976 & Supp. V. 1981).

process by subterfuge is widespread. Requiring the articulation of an administrative plan, including selection criteria, and a demonstration of how a particular site meets those criteria would significantly limit the potential for such abuse.

In sum, this Court should further define the requirements of administrative probable cause in order to assure that administrative inspection warrants constitute neither judicial endorsement of arbitrary governmental action nor convenient subterfuges for criminal investigation.

CONCLUSION

The petition for a writ of certiorari should be granted.

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